Employee Background Checks for Financial Institutions
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I. Financial Institution Legal Requirements
   A. Employees generally
      1. 12 U.S.C. §1829 (banks and insured depository institutions)
      2. 12 U.S.C. §1785 (credit unions)
   B. Mortgage loan originators
      1. SAFE Act
      2. Consumer Financial Protection Bureau (CFPB) Rules
      3. State requirements
      4. Detailed policy statements issued by regulators
   C. Compliance is important -- knowing violations can result in:
      1. Penalties of up to $1,000,000 for each day the prohibition is violated
      2. Imprisonment for up to five years
      3. Or both
   D. What is prohibited employment?
      1. Persons convicted of any criminal offense involving dishonesty or breach of trust or money laundering (or who has agreed to enter into a pretrial diversion or similar program in connection with such an offense) may not:
         a. Become or continue as an "institution-affiliated party" (e.g., director, officer, or employee)
         b. Own or control (directly or indirectly) an insured depository institution
         c. Participate (directly or indirectly) in the conduct of the affairs of the insured institution
      2. Financial institution may seek regulatory (FDIC/NCUA) approval to employ such an individual
         a. 10-year ban on approval applies for certain offenses
   E. What is the employer required to do?
      1. Reasonable inquiry regarding an applicant's history to avoid hiring or permitting participation by a person who does not meet the applicable standard
      2. At minimum, covered institutions should establish a screening process that provides information covering any convictions (or program entry) pertaining to a job applicant
      3. This would include, for example, the completion of a written employment application that requires a listing of all convictions and diversion program entries
F. Is a criminal background check mandatory?
   1. Neither the FDIC nor the NCUA guidance state that a criminal background check is mandatory
   2. Approach must be reasonable
   3. If there is a violation, the regulators will look to the circumstances of each situation to determine whether the inquiry is reasonable
   4. Criminal background checks may serve as evidence of a reasonable inquiry
   5. Background check procedures may differ for different employees

G. To whom do the requirements apply?
   1. Employees of the institution (employees of a holding company may be covered)
   2. "De facto" employees (contractors? Consultants?)
   3. Individuals with influence or control over the management or affairs of the institution
      a. Directors, officers, committee members
      b. Holding company employees with influence or control
      c. Affiliates, consultants, and independent contractors with influence or control
      d. Fact specific inquiry for influence - no precise definition
      e. FDIC defines "control" to include ownership of 25 percent or more of the institution's voting stock (or 10 percent if no other person owns more)

H. What constitutes as a conviction?
   1. There must be a conviction of record
   2. Arrests, pending cases, acquittals, and convictions reversed on appeal do not constitute a conviction
   3. If a conviction is currently on appeal, an application is required until (or unless) reversed
   4. A conviction for which a pardon has been granted will still require an application
   5. A conviction that has been completely expunged does not require an application for regulatory approval
   6. What is a pretrial diversion or similar program?
      a. Suspension or eventual dismissal of charges or criminal prosecution upon agreement to treatment, rehabilitation, restitutions, or other noncriminal or non-punitive alternatives
      b. Determined by relevant federal, state or local law
      c. Considered by FDIC/NCUA on a case-by-case basis

I. What constitutes dishonesty?
   1. "Dishonesty" means directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute
   2. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest
3. What constitutes as a breach of trust?
   a. "Breach of trust" means wrongful act, use, misappropriation or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.

J. What specific crimes require application of the Rules?
1. No list of all crimes exists
2. Whether a crime involves dishonesty or a breach of trust will be determined from the statutory elements of the crime itself
3. Crimes subject to the minimum 10-year prohibition are listed
4. All convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances require an application
5. Do certain crimes not require an application?
   a. Youthful offender adjustments are not considered convictions (e.g., convictions under a youth offender law or an adjudgment as a juvenile delinquent)
   b. De minimis offenses do not require an application
6. What is a "de minimis" offense?
   a. An offense is considered de minimis if it meets all of the following requirements:
      (1) There is only one conviction or entry into a pretrial diversion program for the offense
      (2) The offense was punishable for a term of one year or less and/or a fine of $2,500 ($1,000 under the NCUA rules) and the individual served three days or less of actual jail time (no period of incarceration under the NCUA rules)
      (3) The conviction or program was entered at least five years prior to the date an application would otherwise be required
      (4) The offense did not involve an insured depository institution or insured credit union
      (5) Consent under the NCUA/FDIC rules was not previously denied for the same offense (NCUA rule only)
      (6) An individual with a de minimis conviction must be covered by a fidelity bond to the same extent as other employees in a similar position
   b. Under FDIC rules, a conviction or program entry based on the writing of a "bad" or insufficient funds check will be considered de minimis even if it involved an insured depository institution or insured credit union if the following conditions are met:
      (1) All of the requirements outlined above are met
      (2) The aggregate total face value of the bad or insufficient funds check(s) was $1,000 or less
(3) No insured depository institution or insured credit union was a payee on any of the bad or insufficient funds checks that were the basis of the conviction

II. Mortgage Loan Originators
A. Mortgage loan originators
   1. SAFE Act
   2. Consumer Financial Protection Bureau (CFPB) Rules
   3. State Requirements

B. SAFE Act
   1. Applies to "covered financial institutions"
   2. Includes any national bank, federal branch and agency of a foreign bank, member bank, insured state nonmember bank (including state-licensed insured branches of foreign banks), savings association, or certain of their subsidiaries; branch or agency of a foreign bank or commercial lending company owned or controlled by a foreign bank; Farm Credit System institution; or federally insured credit union, including certain non-federally insured credit unions
   3. Registration required for "mortgage loan originators"
   4. Registration process includes an FBI criminal background check
   5. Licensing may also be required, but depository institutions (e.g., banks and credit union) are exempted

C. A "mortgage loan originator" is an individual who:
   1. Takes a residential mortgage loan application and
   2. Offers or negotiates terms of a residential mortgage loan for compensation or gain

D. A "mortgage loan originator" does not include:
   1. An individual who performs purely administrative or clerical tasks on behalf of a mortgage loan originator (MLO)
   2. An individual who meets the "de minimus" exception (i.e., has never been registered or licensed as an MLO and during the past 12 months has acted as an MLO for five or fewer residential mortgage loans)
   3. Certain licensed or registered real estate brokers
   4. An individual or entity solely involved in extensions of credit related to timeshare plans

E. Registration includes an FBI criminal background check
   2. Fingerprints for the criminal background check submitted to the Nationwide Mortgage Licensing System and Registry (NMLS)
   3. For a new hire who was previously registered, new fingerprints needed if fingerprints on file are more than 3 years old

F. Covered financial institutions must have written policies for SAFE Act compliance
   2. These policies must establish process for:
      a. Reviewing employee criminal history background reports received pursuant to the regulations
b. Taking appropriate action consistent with applicable federal law and regulations with respect to the reports

c. Maintaining records of the reports and actions taken with respect to applicable employees

G.  
1. When the financial institution receives the FBI background check, it must review it in the light of applicable law  
2. This includes, as applicable, 12 U.S.C. § 1829 (banks and insured depository institutions) and 12 U.S.C § 1785 (credit unions)

H. CFPB Rules  
1. Issued under the Dodd-Frank Act  
2. Revises Regulation Z (Truth in Lending Act)  
3. Overlap with SAFE Act requirements, but includes additional background check requirements  
4. Takes effect January 10, 2014  
5. Compliance Guide:  
6. The rules generally apply to "loan originators" involved in consumer credit transactions secured by a dwelling, such as mortgage loan transactions

I. CFPB rules have a different definition  
1. A "loan originator" includes a person who performs any of the following activities:  
   a. Taking an application  
   b. Arranging a credit transaction  
   c. Assisting a consumer in applying for credit  
   d. Offering or negotiating credit terms  
   e. Making an extension of credit  
   f. Referring a consumer to a loan originator or creditor  
   g. Advertising or communicating to the public that the individual can or will perform any of these functions  
2. There are a number of specific exceptions to the definition of "loan originator" under the CFPB, including:  
   a. A person who performs purely administrative or clerical tasks on behalf of a loan originator or creditor, but does not take consumer credit applications or offer or negotiate credit terms available from a creditor

J.  
1. Organizations that employ "loan originators" who are not subject to licensing requirements have specific background check obligations in regard to these individuals  
2. These requirements apply to employees of the organization  
3. The following background check information must be obtained for "loan originator" employees:
a. **A criminal background check** (may be the background check received through the NMLSR registration process)
b. **A credit report**
c. Information from the NMLSR on administrative, civil, or criminal findings reported by any government jurisdiction, or from the individual loan originator if not required to be registered under the NMLSR
d. Before the employee is allowed to originate a loan, the organization must determine that the employee
   (1) Has not during the past seven years been convicted of (or pleaded guilty or *nolo contendere* to) a felony in a domestic or military court
   (2) Has never at any point been convicted of (or pleaded guilty or *nolo contendere* to) a felony involving an act of fraud, dishonesty, a breach of trust, or money laundering
   (3) Has demonstrated financial responsibility, character, and general fitness that indicates that the individual will operate honestly, fairly, and efficiently

K. **Felony Convictions**
   1. A crime is a felony only if at the time of conviction it was classified as a felony in the jurisdiction where the individual was convicted
   2. Expunged convictions and pardoned convictions do not cause disqualification
   3. Individual is not disqualified if organization has regulator (e.g., FDIC, NCUA) consent to employ the individual notwithstanding the conviction

L. **Financial responsibility:**
   1. Must assess all available information, including information obtained through hiring process
   2. Must consider the following factors:
      a. The existence of current outstanding judgments, tax liens, or other government liens
      b. Nonpayment of child support
      c. A pattern of bankruptcies, foreclosures, or delinquent accounts
   3. Do not need to consider debts arising from medical expenses
   4. Do not need to consider debts arising from medical expenses
   5. Can limit timeframe for considering bankruptcies and foreclosures
   6. Do not need to review credit source

M. **Character and General Fitness**
   1. Must assess all available information, including information obtained through hiring process
   2. Must consider the following factors:
      a. Acts of unfairness or dishonesty
      b. Dishonesty in the course of seeking employment
      c. Dishonesty concerning qualifications
      d. Disciplinary actions by regulatory or professional licensing agencies
N.
1. CFPB rules are effective January 10, 2014
2. This information must be collected for loan originator employees as follows:
   a. For any employees hired on or after January 10, 2014
   b. For an employee hired before January 10, 2014, if the employee was not subject to qualification screening (e.g., SAFE Act) at the time of hire
   c. For any employee (regardless of date of hire) for whom there is reliable information that makes it likely that the employee does not meet applicable standards

III. Mortgage Loan Originators
A. State requirements
   1. State licensing requirements may apply and should be followed, if applicable
   2. Employees of depository institutions (e.g., banks and credit unions) generally exempt from state licensing requirements
   3. Many states rely on NMLR process for licensing

IV. Practical Considerations
   1. Background checks may
      a. Reduce turnover by verifying that the potential employee has the requisite skills, certification, license or degree for the position
      b. Deter theft and embezzlement
      c. Prevent litigation over hiring practices

B. FDIC guidance - non-employees:
   1. Institutions should verify that contractors are subject to screening procedures similar to those used by the financial institution
   2. Consultants should be subject to the financial institution's screening process
   3. May not impose requirements on non-employees that would violate the law

C. "Risk-focused approach"
   1. Management should develop a risk-focused approach to determining when pre-employment background screening is considered appropriate or when the level of screening should be increased, based upon the position and responsibilities associated with the position
   2. The sensitivity of the position or the access level of an individual staff member may warrant additional background screening, which should include verification of references, experience, education and professional qualifications
   3. Additional screening may be appropriate when an individual enters a new job classification
4. An on-going approach to screening may be appropriate for certain positions, as circumstances change, or for a comprehensive review of departmental staff over a period of time.

5. Policies should address appropriate actions when a pre-employment or subsequent screening detects information contrary to what the applicant or employee provided.

D. Application for employment
1. A written application should state that untruthfulness or material omissions are grounds for termination and that by signing them, the applicant attests to the accuracy of the information provided.
2. For example, if an individual fails to disclose a conviction in response to an inquiry on an application, that omission (as opposed to the conviction itself) may serve as the basis to deny employment.

E. What information to check
1. Third-party background checks, as appropriate for a particular position.
2. Federal banking agency lists of individuals who have been assessed monetary penalties or been permanently prohibited from banking.
3. Cease and desist orders.
4. FBI Fingerprint Service (available through the ABA: [http://www.aba.com/aba/pdf/fingerprint_faxinfo.pdf](http://www.aba.com/aba/pdf/fingerprint_faxinfo.pdf)).

F. Using a third-party vendor
1. Due diligence to select reputable provider - FCRA compliance.
2. Have legal counsel review agreements and any documentation provided by the vendor.
   a. Some vendor-provided documents (e.g., adverse action compliance materials) do not comply with law, particularly if the financial institution is subject to state or local restrictions.
   b. For criminal background checks, ensure that the appropriate databases will be checked.
EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC), which is responsible for the enforcement of Title VII of the Civil Rights Act, issued a detailed update of its enforcement guidance regarding the use of arrest and conviction records in employment decisions. According to the EEOC, this guidance does not represent a fundamental change in its position on Title VII and criminal records. Rather, the guidance provides a more in-depth analysis on certain issues, which the EEOC believes is timely given employers’ increased access to criminal history information, as well as recent judicial guidance on Title VII and criminal records. The EEOC’s guidance is particularly relevant to certain employers for which a federal law regulates their employment of certain individuals with criminal records, such as financial institutions, insurance companies, government security contractors, etc., and the guidance directly addresses this issue. At the same time, however, the impact of the guidance may be somewhat limited. To begin, the EEOC’s enforcement duties are specific to Title VII, which only regulates an employer’s use of conviction records in certain limited circumstances. In addition, the limitations on an employer’s use of conviction records under a number of state laws already impose restrictions that are similar to those contemplated in the EEOC guidance. [On January 29, 2013, the OFCCP also issued an administrative Notice. That Notice cited the EEOC Guidance and then indicated that federal contractors would be subject to certain compliance requirements regarding conviction record inquiry and use.]

Overview of Title VII and Criminal Records

Title VII of the Civil Rights Act does not directly prohibit discrimination on the basis of a criminal record. The EEOC’s guidance indicates, however, that there are two ways in which an employer’s use of criminal records may violate Title VII. First, an employer’s use of criminal records in a manner that evidences disparate treatment of a protected class may violate Title VII. For example, an employer that rejects an African American applicant on the basis of a criminal record but hires a similarly situated white applicant with a comparable criminal record could be found to have violated Title VII. This guidance is not new, but it serves as an important reminder that employers that have employment policies regarding the consideration of criminal records in employment decisions must apply those policies in a consistent manner.
Second, an employer’s use of criminal records in a manner that has a “disparate impact” on a protected class may violate Title VII. Disparate impact discrimination may occur when an employer’s “facially neutral” policy has a disproportionately negative impact on those in a protected class. Again, this point is not new, and employers may already be familiar with disparate impact issues in other contexts. For example, the Consumer Financial Protection Bureau has recently advised lenders that it will apply a “disparate impacts effects test” in fair lending examinations. Still, although not entirely new, the EEOC’s guidance provides a more in-depth analysis of its position on consideration of arrest and conviction records in employment decisions. The EEOC’s concern with disparate impact in employers’ use of conviction records stems, at least in part, from recent statistics that show that African Americans and Hispanics are arrested and incarcerated in disproportionate numbers in relation to the general population. For example, the EEOC’s guidance cites a 2001 U.S. Justice Department estimate that while 1 out of every 17 white men is expected to go to prison at some point in his lifetime, the expected rate is 1 out of 6 for Hispanic men and 1 out of 3 for African American men. In its guidance, the EEOC concludes that this data “supports a finding that criminal record exclusions have a disparate impact based on race and national origin.”

In addition, the guidance also cautions that in designing and implementing criminal records policies, employers must carefully distinguish between arrest records and conviction records. The EEOC notes that an arrest record, in itself, is not evidence of criminal conduct. Thus, a policy to screen out candidates based solely on an arrest record is not permissible. Rather, an employer must look to the underlying facts to determine if business necessity justifies adverse employment action in regard to an arrest (i.e., it is the underlying circumstances, not the arrest, that is relevant). In contrast, a record of conviction generally provides sufficient evidence that the individual engaged in particular criminal conduct, so the conviction record itself may be relevant to employment considerations.

**EEOC’s Guidance on Compliance with Title VII**

The EEOC’s compliance guidance focuses primarily on the disparate impact analysis discussed above. Under this framework, if an employer’s use of criminal records has a disparate impact on a protected class, then the employer will be liable under Title VII unless it can demonstrate that its criminal record policy or practice “is job related for the positions in question and consistent with business necessity.” According to the EEOC, “the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.” As a general matter, the EEOC’s guidance focuses on the need for employers to have specific evidence to justify a criminal records policy. The guidance rejects the idea that a policy can be adequately supported with a generalized concern about security.

The EEOC’s guidance provides an example of a circumstance in which it believes an employer’s criminal records policy would meet the “job related and consistent with business necessity” defense. Specifically, the EEOC believes an employer will meet that defense if it “develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job [known as the Green factors] . . . , and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.”
In effect, the EEOC is suggesting that employers consider the particular facts related to each individual with a criminal record before taking an adverse employment action on the basis of the individual’s record: “Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual’s additional information shows that the policy as applied is not job related and consistent with business necessity.” The EEOC outlines a number of factors that may be relevant to an individualized assessment, such as the facts and circumstances surrounding the offense or conduct; the number of convictions; the age of the convictions; the individual’s employment history (e.g., evidence that the individual successfully performed the same type of work post-conviction); rehabilitation efforts; and whether the individual is bonded under a federal, state, or local bonding program.

Finally, even if an employer is able to establish that its policy is job related and consistent with business necessity, the employer may still be held liable under Title VII if the employee can show that there is “a less discriminatory ‘alternative employment practice’ that serves the employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt.”

**Specific Issues Applicable to Some Industries**

For organizations which are subject to federal regulations restricting the hiring of individuals with certain criminal convictions, there is an additional twist in the disparate impact analysis. As the EEOC’s guidance acknowledges, “In some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations.” The guidance goes on to explain that “[c]ompliance with federal laws and/or regulations is a defense to a charge of discrimination.” The guidance specifically notes that banks are among the employers who are subject to such federal laws, specifically 12 U.S.C. § 1829, which requires a ten-year ban on employing individuals in banks if they have certain financial-related convictions. Thus, banks that properly comply with their legal obligations under federal law regarding the hiring of individuals with certain types of criminal records should not be in violation of Title VII. So, this guidance should apply to other similarly-situated employers. [National security/defense contractors may be required to do background checks. Many states require mandatory criminal background checks for caregivers in child care, nursing homes and other health care settings.]

However, the EEOC’s guidance specifically notes that to the extent that employers choose to impose conviction record exclusions that go beyond the requirements of federal law, those exclusions would be subject to a Title VII analysis. Therefore, to the extent an employer wishes to adopt criminal records policies that are more expansive than the requirements of federal law, it must analyze the policy to ensure that it will comply with Title VII (as well as other applicable state laws).

The EEOC’s guidance provides an example on this point. The example concerns a bank that has adopted a policy that prohibits the hiring of anyone with convictions for any type of financial or fraud-related crimes within the last 20 years, which is more restrictive than the 10-year
restriction imposed by federal law. In the example, the bank justifies the policy by asserting that it is necessary for its depositors to have 100% confidence that their funds are safe, but it provides no specific evidence that there is an elevated likelihood of committing financial crimes for someone who has been crime-free for more than 10 years. The EEOC concludes that if the policy were shown to have a disparate impact on a protected class (which is a prerequisite for liability under a disparate impact analysis), then the policy would violate Title VII because the bank’s “generalized concern about security, without proof” is insufficient to support adding 10 years to the federally mandated exclusion.

Another area where the EEOC’s guidance could present an issue is in relation to bonding requirements. Some bonds include restrictions regarding criminal records, and an employer may wish to use an individual’s inability to meet those conditions as the basis for an adverse employment decision. If, however, the bond requirements are more stringent than federal law, the EEOC’s guidance suggests that to ensure compliance with Title VII, the employer would have to consider whether such adverse employment action is job related and consistent with business necessity.

**Employment Applications**

The EEOC’s guidance directly addresses inquiries regarding criminal records on employment applications. In one portion of the guidance, the EEOC explains, “[a]s a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.” The EEOC’s reference to “applicable laws” refers to 12 U.S.C. § 1829, which imposes hiring restrictions on banks. Thus, we believe that the EEOC’s guidance recognizes the validity of a regulated employer, whether a bank or security company or any other organization subject to federal or state background check requirements, asking for criminal record history on an application in order to ensure compliance with federal law.

Federal law, specifically 12 U.S.C. § 1829, prohibits the hiring of individuals convicted of any criminal offense involving dishonesty or breach of trust or money laundering without permission from the Federal Deposit Insurance Corporation (FDIC). Further, it imposes a 10-year ban against the FDIC’s consent to the hiring of individuals with convictions for certain enumerated crimes. In light of this law, the FDIC’s Statement of Policy provides as follows in regard to employment applications:

The FDIC believes that at a minimum, each insured institution should establish a screening process which provides the insured institution with information concerning any convictions . . . pertaining to a job applicant. This would include, for example, the completion of a written employment application which requires a listing of all convictions.

If an Application for Employment requests that applicants specify whether they have been convicted of any criminal offenses and whether they currently have any pending criminal charges, it should also request that applicants list certain details of any such convictions or pending charges and provide that neither a conviction nor a pending charge will “automatically disqualify
an applicant from employment” and that the nature of the conviction or charges will be considered “in accordance with law.” This sort of application seems to be consistent with the FDIC’s Statement of Policy, the EEOC’s guidance regarding arrest and conviction records, and state laws.

**Impact on State Laws**

Fourteen states have laws limiting the use of arrest/conviction and/or less than honorable discharge in employment decisions. For employers in many of those states, certain elements of the EEOC’s guidance (such as the suggestion of an individualized assessment) should not be entirely unfamiliar. An employer may be liable under the state law if it takes adverse employment action against an individual on the basis of an arrest or conviction record. However, some of those laws also contain certain exceptions to its general prohibition of discrimination on the basis of arrest or conviction records. For example, it is not employment discrimination for an employer to refuse to employ an individual who has been convicted of an offense that is substantially related to the circumstances of a particular job.

The EEOC’s guidance regarding Title VII explains that Title VII preempts any state law or local law that purports to require or permit the doing of any act which would be an unlawful employment practice under Title VII. That is, if a particular employment practice violates Title VII, an employer will likely not be able to rely on state law as a defense. For employers in states with arrest or conviction discrimination laws, this means that before relying on state law in taking an adverse employment action, an employer must also consider whether the action would violate Title VII.

One specific area where this may present an issue is in regard to the consideration of the age of conviction records. States vary widely, some have limits, some have none. Some states allow an employer to deny employment to individuals with “substantially related” convictions regardless of the age of that conviction. This interpretation could be found to be inconsistent with Title VII, since the EEOC’s guidance, as discussed above, directs employers to consider the age of a conviction. Thus, employers should seek counsel when designing or implementing employment policies regarding conviction records.

**Action Items**

In light of the EEOC’s guidance, employers should take the following actions:

- Review any policies regarding the consideration of arrest or conviction records in employment decisions to ensure that they are consistent with the EEOC’s Guidance. For example, to the extent a policy is more restrictive than federal law and could result in disparate impact, it should be reviewed for compliance with the EEOC’s guidance regarding the “job related and consistent with business necessity” defense.

- Review the manner in which such policies are implemented to ensure that implementation is consistent with EEOC guidance. For example, consider whether
policies are consistently applied (i.e., to avoid disparate treatment), whether a proper distinction is made between arrest and conviction records, and whether an individualized assessment is used when appropriate.

- Review job applications for compliance.
- Contact counsel with any particular concerns.

The full text of the EEOC’s guidance can be found here: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

In addition, a brief Q&A issued by the EEOC along with this guidance can be found here: http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.
Employer Regulation of Social Networking

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I. Access Issues

A. Modes of Access

1. Social Sentry - Teneros
2. Google Alerts
3. TweetDeck
4. Condition of Employment

In 2009, the City of Bozeman required all employees to disclose “all current personal or business websites, web pages, or memberships on any Internet-based chat rooms, social clubs or forums, to include but not be limited to: Facebook, Google, Yahoo, Youtube.com, MySpace.com, etc. Employees are required to disclose their user names, log-in information and passwords.” This requirement was quickly dropped after an onslaught of public criticism.

B. Stored Communications Act - 18 U.S. C. §§2701-11

1. This law makes it illegal to “intentionally access without authorization a facility through which an electronic communication service is provided … and thereby obtain … access to a voice or electronic communication while it is in electronic storage in such systems.”

2. An exception to this prohibition is if the “conduct is authorized … by a user of that service with respect to a communication of or intended for that user…”

   a. An employee created a MySpace.com group for current and former employees to vent about their employer.

   b. A manager learned about the group from one of the participants. The manager told his supervisor, who in turn asked the participating employees for the login password. No threats were made. The employee testified, however, that she “thought she would have gotten into some sort of trouble” if she did not cooperate with the supervisor and give him the login.

   c. The MySpace site stated that the group was private and only for the use of invited members.

   d. The court concluded that a jury could reasonably infer that the purported authorization was coerced and provided under pressure. The jury made such a finding and awarded approximately $15,000.00 to the employee.


   a. A pilot created a site for invited guests to post criticisms of management.

   b. The company president accessed the site using the name of one of the invited pilots and creating a password under that name.

   c. The pilot who created the site sued for invasion of privacy.

   d. The court concluded that since the pilot whose name the president used was not an actual “user” of the site, the president’s actions did not fall within the exception the Stored Communications Act.

5.  *City of Ontario v. Quom* - United States Supreme Court (2010)

   a. Officers on the City’s SWAT team were issued pages with texting capability.

   b. The City had a policy that any text messages on City property would be public information and subject to search.
c. However, the finance officer told officers that as long as they promptly paid for personal usage, no one would ever look at the content.

d. One officer texted personal and sexually explicit messages.

e. The City viewed the messages as part of an audit reviewing excessive usage.

f. The officer sued the City for invasion of privacy. The trial court, then the appellate court, ruled for the officer, finding the finance officer’s statements had created an “expectation of privacy.”

g. The U.S. Supreme Court assumed without deciding that the officer had a reasonable expectation of privacy, but that the City’s search was reasonable under the Fourth Amendment.

h. “The Court does not resolve the parties’ disagreement over Quom’s privacy expectation. Prudence counsels caution before the facts in this case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations of employee’s using employer-provided communication devices. Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. At present, it is uncertain how workplace norms and the law’s treatment of them will evolve.” The message from this case: Have a clear electronic communications policy on rights to monitor and inspect electronic usage. Make sure all employees sign the policy. Train all managers to support, and not undermine, all policies -- whether they agree with them or not.

C. Wiretap Act - 18 U.S.C §§2510-2522

1. This law makes it illegal to “intentionally intercept … any wire, oral or electronic communication.”

2. “Intercept” has generally meant to apply to communications contemporaneous with transmission. Steve Jackson Games, Inc. v. U.S. Secret Service, 36 F. 3d 457 (5th Cir. 1994); U.S. v Smith, 155 F.3d 1051 (9th Cir. 1996).

3. Each employee should sign an authorization which clearly lets the employer monitor. It should also give clear warning that there is no privacy, and that the employer owns all content in the system.
Unclear computer use policy and company attorneys’ overreach violated both privacy and legal ethics (sanctions for company and its attorneys). An employee used her company laptop to communicate with her attorney about her concerns of sex, religion and national origin discrimination. All emails were to and from her personal email account; she just went to that account through the company’s internet access. She left and then sued the company, but the record of her personal account remained on the company laptop’s hard drive. The company reviewed the contents. The company attorneys then used her attorney-client communication in preparing its case defense strategy. When this came to light, the ex-employee added an invasion of privacy case to her suit. The New Jersey court ruled that the company’s electronic usage policy was “vague.” It did not clearly inform employees that personal usage, including accessing one’s own personal account via the company computer, was archived in the hard drive, became a company record and was not private. Therefore, it found that reading her personal account emails was an invasion of privacy. Even if the policy had been clear, reading attorney-client emails was still impermissible. The court held that the “attorney-client privilege is venerable” public policy. Any company attorneys should know this, and not invade that privilege. So, in addition to an invasion of privacy, the company’s legal counsel was involved in violation of the Ethics Code, and the attorneys themselves may be subject to additional sanctions by the court. Stengart v. Loving Care Agency, Inc., (N.J. Ct. of Appeals, 2010).


1. “Employees shall have the right … to engage in other concerted activities…”

2. “It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce an employee’s exercise of the rights guaranteed in §157…”

3. Concerted activity is defined as two or more employees working together to improve wages, hours or other terms and conditions of employment.

4. Employee communications using social networking tools may constitute “concerted activity” which is protected under the NLRA even if the employer is not unionized.

E. Wisconsin Fair Employment Act, §§ 111.31, 111.321 and 111.35

1. This law makes it illegal to base an employment decision upon the use or nonuse of lawful products.

   a. To the extent communications on social networking sites reveal use of lawful products (e.g. alcohol), such cannot be used as the basis for employee discipline.
b. The statute provides an exception if the use of the lawful product impairs the employee’s ability to undertake adequately the job-related responsibilities, conflicts with a bona fide occupation qualification related to the job or creates a conflict of interest with respect to those duties.

II. Employee Conduct

A. Promotional Activities

1. Federal Trade Commission - 16 C.F.R. §255

   a. Employers may be subject to liability for false or unsubstantiated statements made through endorsements or through the failure to disclose material connections between themselves and their endorsers.

   b. If an employee’s statements are related to a company’s products or services and do not disclose the employment relationship between the employee and the employer, the employer may be held liable for false or unsubstantiated statements even if the employee’s comments are not authorized or known by the employer.

2. The FTC has recently commenced an enforcement action against a public relations firm which had employees post favorable reviews of a client’s work on iTunes store.

B. Prohibited Harassment

An employer’s harassment policies should be broad enough to include the prohibition of communications both on duty and off-duty in social networking forums which create a workplace hostile environment.

C. Disclosure of Confidential Information

1. A significant concern involves employees’ use of social networking forums to disclose an employer’s current activities - e.g., Twitter - which might be used by someone to the employer’s disadvantage.

2. Trade secrets, product information and other confidential information can be disclosed on social network forums.
D. Work place productivity.

1. Should employers allow employees to utilize social networking devices during working time or just during non-working time?

2. If an employer provides electronic devices for employee use, should an employer allow personal usage on that device?

E. References

1. Some social networking sites, e.g., Linked In, have sections for “Recommending” site users and for comment on former employees.

2. Employers should give consideration to a prohibition on a manager’s use of these sites to “recommend” a person or comment on an employee’s current or past job performance.

F. Fair Labor Standards Act

1. The FLSA provides that off-duty time in which a non-exempt employee is required to be on-call may be compensable.

2. An employer should analyze whether a non-exempt employee is required to or voluntarily agrees to check-in to work or respond to social networking communication during non-working hours.

III. Off Duty Acts Which Reflect In the Employee or Harm the Mission

Legal use. Generally, an employer cannot discipline for off-the-job legal activities. However, the more identifiable the employee is and the more impact it has on their work role, especially as a public employee, the more there may be a “compelling interest” for employer action. Richerson v. Beckman (9th Cir., 2009).

Sheriff’s deputies have no right to be off-duty porn stars. Two deputies were fired when they were seen engaging in off-duty sex acts on a “private” pay-per-view Internet porn site run by the wife of another deputy (who resigned before he was fired). The court upheld the Department’s off-duty conduct rule because their conduct “undermined the public’s confidence in police operations.” This compelling interest overcame any constitutional off-duty privacy or free expression interest of the officers. Thaeter and Moran v. Palm Beach County Sheriff’s Office 449 F.3d 1342 (11th Cir., 2006). In San Diego v. Roe, 543 U.S. 77 (2004), the Supreme Court upheld discharge of a police officer’s off-duty porn activity finding that the off-duty expression was not a protected activity which raised a “matter of public concern.”
Police officers or key officials overt off duty racist behavior or websites may be grounds for discharge. “The First Amendment does not require a government employer to sit idly by while its employees insult those they are hired to serve and protect.” Locurto v. Giuliani 447 F.3d 159 (2nd Cir., 2006). The off duty activities were disruptive of the mission of the police department, to “equally protect all citizens.” Pappas v. Giuliani: 290 F.3d 143 (2nd Cir., 2003), cert. denied by 539 U.S. 958.

School teacher fired for posting nude photos on Internet. A school district received complaints that a tenured elementary teacher had multiple pictures of herself undressed or nearly so on multiple public access Internet dating service sites. The school board terminated her contract. She sued for violating the contract and also violating her right to engage in legal activities on her private time. The arbitrator ruled against the teacher. Teachers can be held to a higher standard. Her photos were easily accessible by the public, as opposed to private access sites. The photos were disruptive to the educational process and efficient operation of a school system. They were not expressions of public concern which might qualify for Constitutional protection. In re Phoenix City Bd. of Education (2009). This decision is in accord with a number of others which hold teachers, police officers and other public officials to a higher standard of off-duty conduct than the average employee.

IV. Social Networking Policy

A. Provides that the employer reserves the right to monitor social networking use whether during work time and outside of work hours if such use impacts the employer.

B. Provides that any social networking performed on employer property or using employer networks is employer property and that the employee does not have any expectation of privacy with respect to any communications utilizing them.

C. States that misuse of social networking forums can be a ground for discipline, up to and including termination.

D. Prohibits disclosure of trade secrets and confidential information and unauthorized disclosure of employer activities.

E. Prohibits unauthorized display of the company’s logos and trademarks on social network sites.

F. Defines when social networking tools can be used during the work day for personal purposes.

G. Identifies whether personal usage is permitted on company-owned devises or using company networks.
H. Prohibits the use of the company’s email address for registration on social networking sites.

I. Prohibits posting false or defamatory information regarding the company or any of its employees.

J. Makes the use of social networking sites subject to the employer’s harassment policy.

K. Requires that if an employee participates in social networking activities that the employee states on those sites that the views expressed by the employee are the employee’s private views and not those of the company.

L. Prohibits the employee from representing either expressly or implicitly that the employee is a spokesperson for the company.

M. Requires that if an employee expresses an opinion about the employer’s product or services or those of an employer’s client, that the employee is employed by the Company.

O. Restricts the use of social networking devices of non-exempt employees for purposes of work-related tasks during non-working hours.
REFERENCES IN EMPLOYEE SELECTION

by

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References are an important part of the employment process. Among the purposes of seeking references is to check the validity of what job applicants say about themselves, to find out what their performance was actually like, to get firsthand reports of what sort of employee they were and to see if their credentials are valid.

At the same time, the reference process has come under increasing attack by unsuccessful job applicants; cases alleging discrimination, defamation, retaliation and more have made both the seekers and the givers of reference very cautious. The following information is intended to clarify the process by giving information on the rights and responsibilities of employers on both sides of the reference.

First, references are a valid and necessary part of the hiring process. An employer has legitimate reasons to solicit references, and a former employer has a legitimate authority to provide references.

WHO IS A PROPER REFERENCE SOURCE?

Anyone who is familiar with the applicant's work-related behavior is a proper source. Most employers choose to eliminate family and close friends of the applicant because they are less likely to be objective sources. The most common sources are former employers, present employers, teachers, customers, and specialized sources such as licensing boards.

An often ignored source is oneself. Many supervisors have the impression that conducting a “fair” hiring process means considering all applicants in a “neutral” manner and ignoring one's own personal knowledge of a given candidate. However, if you know the work record of a candidate, you may be the best reference source. You are direct, so there will be no confusion in interpreting the communication from the source. You may be in the best situation to judge the applicants performance and abilities.

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In one case, an unsuccessful job applicant sued and lost. The plaintiff had better qualifications on paper than the person hired. The employer, though, had personally supervised the successful candidate and used personal knowledge of the high quality of that person's work to make the decision. It should be emphasized that the supervisor used “objective” criteria which could be proven in court. *Ankiewicz v. City of Boston*, 24 Fair Empl. Prac. Cas. 732 (D.C. Mass.); see also *Jenkins v. Caddo-Bossier Association for Retarded Children* (5th Cir.).

“Objective” information is that which can be observed or measured and documented and does not depend on an individual's interpretation as to what it means. Attendance, technical skill, number of customer complaints, written communication ability are examples of objective criteria.

“Subjective” information is less tangible, difficult to prove, and very open to abuse. Criteria like “positive attitude,” “loyalty,” “common sense,” “assertiveness,” and “leadership” are vague terms that mean different things to different people. Unless they are explained by reference to specific incidents of behavior, a reference receiver has little idea what the giver means by these terms. Subjective references are not illegal, but they are highly suspect and are the most likely to lead one into legal trouble. The employer who uses subjective criteria then has the uphill struggle of bearing the burden of proof to show that they were not used unfairly. *Jenkins v. Caddo-Bossier Association for Retarded Children*, supra, (Miss.).

**DUTY TO CHECK REFERENCES**

Generally an employer checks references to select the best candidate for a job and to protect from hiring people with poor work habits. An employer who does not check simply takes a risk of hiring someone without getting the fullest information and may get a poor performance.

There are, however, situations in which there is a duty to check references. Failure to check can result in the employer being held legally liable to other people. This duty exists where the employee has a “duty of care” toward others.

“Duty of care” normally exists when an employee is entrusted with the care of the health, finances, or safety of customers, clients, or the public. For example, where a hospital failed to check the references of a doctor before permitting him to practice and a check would have revealed that the doctor did not have proper credentials and had a series of malpractice claims, the hospital was held responsible and liable for injuries suffered by improperly-treated patients. *Johnson v. Misericordia Community Hospital* (Wis.); *Joiner v. Mitchell Co. Hospital Authority* (Ga.).

Other jobs that have a special “duty of care” to customers, clients, or the public include (but are not limited to) pharmacists, accountants, police officers, nurses, dentists, optometrists, investment counselors, attorneys, child care providers, drivers/pilots of public transportation or common carriers, residential repair or service workers, and anyone who handles the money of others or is entrusted with other people's property or premises.

When a person is in a job where a “duty of care” exists, the employer should at least:

1. Check to be sure the person has necessary licenses or certification;
2. Contact regulatory agencies or ethics boards to see if there has been a history of complaints or findings of improper practices;

3. Contact malpractice insurance carriers to discover whether there is a history of valid claims;

4. Contact the applicants peers, including those not listed on the application, who have knowledge about the persons experience and competence; and

5. Conduct a criminal records check. Many states now require a records check by health care, child care and public safety workers.

SCOPE

The proper scope of reference is “work relatedness.” Start with the position description for the job you are filling. Each and every reference question should be related to duties or responsibilities on that position description.

The reference questions should also be directly or narrowly relevant to the position description. Almost any piece of information can be stretched to be “somewhat” relevant to the job. For instance, the number of young children an applicant has might be seen as relevant to that persons likelihood to be absent from work. The employer who asked that question was sued and lost. An applicant’s family or personal life are improper consideration for a business hiring; the employer is making unfounded assumptions based on indirect factors. If you want to determine reliability, then ask the former employer a direct question about the candidates work attendance record. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

Scope also refers to the number of references one must check. The general rule is that all candidates should be treated similarly; so a roughly equal number should be checked for each.

One bad reference is usually enough justification to eliminate a candidate. However, there are special circumstances where this is not the case. The obvious one is where you believe the negative reference is biased or otherwise unfair and unrepresentative of the true picture. You have the right to check further.

GET AN AUTHORIZATION

The application form should have an authorization which gives permission to check references, and lets the applicant know there will be no limit on who may be contacted.

Example:

REFERENCE AUTHORIZATION

I understand that references will be contacted, and that appropriate work-related references are not limited to those listed in my application.
I authorize ______________________ to contact and secure information about my educational background, work experience, credit rating and to secure records of licensing, administrative, regulatory or any other governmental agency, and to contact any other information source relevant to employability. I hereby release its subsidiaries, officers and agents from liability for seeking such information, and all other persons, schools, corporations or organizations for furnishing such information.

In processing this employment application, we may request that an investigative consumer report be prepared, which may include information as to your employment, finances and general reputation. If so, you will receive a separate authorization form, in addition to this application.

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___________________________  _______________________
Signature                  Date

Caution: This form is good for references directly contacted by the employer. It is not sufficient if you use a third party under the FCRA. As the above box states, a separate FCRA authorization is required.

Also include a Certificate of Truthfulness. If the application and resume turn out to be untrue, based on either references or after hire discovery, you can easily, clearly terminate the process, or the employee if already hired.

Example:

Certificate of Truthfulness and Understanding of Employment At Will

I certify that the facts contained in this application are true, and I understand that any false or misleading statements or omissions on this application may result in rejection of this application or, if hired, in discharge.

I understand that ______________________ is an Employer At Will, which means that if employed, my employment is for no definite period and may be terminated at the
will of myself or my employer at any time, without notice, for any reason, or for no reason. No employee of the company is authorized to promise me anything contrary to what is stated in this paragraph, and I may not rely on any such representations.

I also understand that all rules, manuals, employee handbooks or personnel policies are descriptive only. They do not form any sort of contract between myself and the employer, and they may be unilaterally changed, or not applied, as the employer believes to be in the best interest of the company at the time.

______________________________  __________________________
Date                              Signature

SPECIAL ISSUES

USE OF PRIVATE INVESTIGATORS AND CREDIT REPORTS

Many employers use private firms such as credit agencies, security firms, employment agencies, and private investigators to do reference or background checks on current or prospective employees. Many of these firms have specialized skills and abilities which save time and provide a valuable service in the hiring process.

The Fair Credit Reporting Act (FCRA) was originally adopted in 1971, in part for the purpose of ensuring that credit reporting and investigative agencies “adopt reasonable procedures for meeting the needs of commerce for credit, personnel, insurance and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of information.”

Sometimes an employer may wish to obtain additional information on the subject in the form of an “investigative consumer report.” Investigative consumer reports are reports of a person's character, general reputation, personal characteristics or mode of living, obtained through personal interviews with neighbors, friends or associates of the consumer reported on or with others with whom he or she is acquainted or who may have knowledge concerning any such items of information. This does not include specific information obtained directly from the consumer's creditor or from the consumer.

The initial requirement is that the reference information is used only for a legitimate employment purpose. Such “employment purposes” are expressly limited to evaluating a consumer for employment, promotion, reassignment or retention as an employee. A consumer report, for instance, could not be obtained for the purpose of confirming a suspicion of embezzlement by an employee who has suddenly given his or her resignation. 15 U.S.C.S. Section 1681a(a)(h); Shelter Financial Services, 604 F.Supp. 601 (1984).
You must certify to the consumer reporting agency providing the report that you will comply with the requirements outlined in the amendment, and will not use the information in violation of any applicable federal or state equal employment opportunity law or regulation. You have the burden of showing that the requested information (i.e., credit rating, etc.) has some relevance to the job in question. There can be great liability for failing to specify the purpose of the check.

The Act next requires you to provide a clear and conspicuous written disclosure to the consumer that a report may be obtained for employment purposes. The disclosure must be a separate document from other documents such as a job application. This disclosure should include the signed permission from the consumer to obtain the report. (The background search agency you use should have a form you can use.)

The independent agency may be obligated to give information to the subject of the search, especially if revealing the existence of public record information such as judgments, bankruptcy filings, or foreclosures. In this regard, the agency must:

1. At the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

2. Maintain strict procedures designed to insure that, whenever public record information which is likely to have an adverse effect on the consumer’s ability to obtain employment is reported, it is complete and up to date. 15 U.S.C.S. Section 1681k.

If you intend to procure such a report, you must:

1. Notify the subject in writing that a check or investigation is being conducted. This must be done within three days of making the request to the investigating firm.

2. In the notice, inform the subject that (a) they have a right to request a written report of the nature and scope that the investigation will have, along with a written summary of the rights of the consumer prepared under Section 1681g; and (b) you have certified to the reporting agency that the above provision has been complied with. If the subject makes the request, you must send the written report within five days.

If a decision is then made against the job applicant, based on the investigation, you must:

1. Inform the subject of the decision.

2. Inform the subject of the general nature of the information that caused the adverse decision. (This does not require details. It can be one sentence stating the general area of concern.)

3. Inform the subject of the name and address of the outside agency which supplied the investigatory report.
4. Inform the subject that there is a right to make a written request for a report on the investigative information. If the request is made, then you must supply that report, stating the nature of the information upon which the decision was based.

CRIMINAL BACKGROUND SEARCHES

Criminal records checks are important. They can prevent negligent hiring liability. Many states require criminal background checks for jobs in healthcare, childcare, finance, security, etc. These searches may be done by an investigative agency under the FCRA. They may also be done directly by any employer (and not create a FCRA issue). Each state has public records of convictions, usually accessible by anyone with a computer.

Unfortunately, there is no national data bank for private employers to use. It is a state by state search. Also, there is no set format. So, for the unfamiliar, it can be difficult to determine the exact outcome of a case, and whether there was a conviction or not. There is also a deal of misreporting or confusion of similar names. So, care must be taken to be sure search results are accurate and correctly interpreted.

**Arrest or Conviction Record (in states which have an arrest/conviction EEO category)**

A growing number of states have laws which prohibit arrest or conviction record discrimination. Under most of these laws, an employer may not consider the fact that a candidate has an arrest or conviction record **UNLESS** there is a direct and substantial relation between the arrest/conviction and future job performance. “Conviction” has a broad meaning; it is generally defined in the law as:

Information indicating that a person has been convicted of any felony, misdemeanor or other offense, has been judged delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned or pardoned by any law enforcement or military authority.

The theory behind this provision is that one who has been arrested is not guilty until proven so. One who has been convicted and has served a sentence to the satisfaction of the state should be punished no more. The inability of those individuals to get employment only serves to promote recidivism rather than promoting rehabilitation.

The employer may feel morally squeamish or even indignant about hiring someone with a criminal record. However, the law focuses on business reasons. One must be able to prove a concrete, direct, and substantial relationship between the arrest or conviction and the specific duties of the job before a candidate can be turned down.

**Examples:**
1. A convicted embezzler can be denied a job as a bank cashier.
2. A person arrested for abusing children can be denied jobs as a child day care worker, school bus driver, or teacher.
3. A person convicted of theft from residences can be denied a job as a custodian with keys in an apartment complex or virtually any other facility where they work unsupervised and there are items which can be taken.

On the other hand:

1. An embezzler could not be denied a job as a short order cook. One would not come into contact with funds.

2. The child abuser could not be denied a job as a cashier behind a counter. One would not pose a threat to any children in that capacity.

3. The person convicted of residential theft could not be denied a job as an assembly line worker. There is no connection between assembly and breaking into residences, and one is under tighter supervision on a line.

An employer does have a legitimate reason to know whether a person has any directly and substantially relevant convictions or “pending” charges (old arrests are not a proper subject of inquiry). The employer has an interest in protecting itself against liability and damages. Clearly, it would be reasonable to check the related conviction and pending charge history of any person who would be in a position of “special trust” in relation to customers or to company funds. Examples could be: teacher, health or child care worker, bank teller, cashier, bookkeeper, drivers, finance managers, or anyone who enters a customer’s home or is entrusted with a customer’s property.

These inquiries should not be blanket “fishing expeditions.” The conviction must be directly and substantially relevant to the job at issue. So for a driving job, the traffic convictions and license points would be the issue. However, for anyone working in customers’ homes, the prior burglary conviction would be vital information. This also applies to those in charge of customer property. In Wisconsin, the majority of theft-by-employee cases in auto dealerships for instance, have been by “lot attendants” who either burglarize customers’ cars themselves or “set up” the cars to be burglarized by accomplices. Some of these lot attendants have had prior theft or burglary records which were not checked before hire because the management felt that these were “lesser jobs” and not worth the effort of a reference check.

One can ask a candidate whether there are any arrests or convictions which relate to the job at hand or the employer may develop a list of those crimes which are relevant to each particular job.

If an applicant does respond “yes” to such a question or a check reveals a conviction or pending charge, then the employer should find out the details in order to see if it is indeed related. Under most state laws, simply rejecting a candidate because they listed a particular crime would be difficult to justify. One must consider the circumstances before reaching a decision.
If the crime is directly and substantially relevant to the job duties, then an employer can refuse to hire a candidate who has been convicted or who has an arrest with outcome pending.¹

Types of questions which are too broad or suspect regarding arrest/conviction record are:

1. **Have you ever been convicted of a crime?** This is too broadly stated. It should at least be phrased in terms of: “Have you been convicted of or have charges pending for any crime which is related to the duties of the job you are applying for?”

   This, at least, makes the question “job-related.” Again, a list of specific infractions, related to specific jobs, would be a better approach.

Often the employment application states the question: “Have you ever been convicted of a crime (except for traffic violations)?” Then the applicant is hired for a position involving driving. So the question is not only overly broad; it actually misses the very record that is substantially related to the job.

If you do include a conviction question, then be sure to also include the following statement on the application: A criminal record does not constitute an automatic bar to employment, and will be considered only as it relates to the job in question.

There may be no need at all to have an Arrest/Conviction Record question on an employment application if a records search is done as part of the reference check. Then the problem is avoided. First, usually employers only do checks on the top candidates so you avoid the danger of Arrest/Conviction Record cases being filed by people who were cut from consideration at an early stage for some other reason. Second, the manager can review the record check and see which convictions are relevant, rather than rely on the candidate’s “self report” or having to develop a “check list” for each job.

Also, be sure to train anyone who is evaluating the conviction records of candidates so that they clearly know the limited way a conviction record can be used and how to interpret whether a conviction or pending charge is directly and substantially related to the job in question.

2. **Fidelity bond ever refused? Eligible for Bonding?** This represents an indirect effort to find flaws in an individual’s past. However, a bond may be denied for totally arbitrary and discriminatory reasons which the individual cannot challenge. Unless this question is based on a directly job-related business necessity, it may be held discriminatory.

¹ Beware of a trick of wording in the law of some states which has caught a number of employers off guard. Under these laws, you can refuse to hire due to arrest or conviction. After an employee is hired, then you can only terminate due to a conviction. An employee arrested for a crime relevant to the job duties can only be suspended pending the outcome and only terminated if convicted.

² Frequently a job applicant is cut due to some other reason, but because the application contains a suspect question it raises the implication of discrimination. Then the employer has to prove that there was “Just Cause” for the cut and that the suspect question did not play a role.
You may not reject a candidate for not being bondable unless bonding is **required** for that job or for **all** employees.

Again, this may be a question you direct only to the applicants for the specific jobs requiring bonding. Also, in some states there are “alternative bonds” available for some people with conviction records. If such an “alternative” is possible, you cannot reject the applicant.

3. **Type of military discharge?** This has been used to find flaws or indicate a past record. However, there are a number of less than honorable discharges which are given for non-disciplinary and non-criminal reasons.

**STATE LAWS ON ARREST/CONVICTION RECORD**

The state laws which cover arrest or conviction record discrimination vary widely. Some have very broad provisions. Some only cover public employment. Some cover only arrest records, which never resulted in conviction.

**Record of Arrest or Conviction in Private and Public Sector Employment.** These states prohibit consideration of either **fresh** arrest (pending conviction) or conviction in employment decisions **unless** there is a “direct and substantial” or a “reasonable” relationship with the job (Wisconsin, Pennsylvania, New York and Kansas). Hawaii requires the employer to make a conditional offer of employment before checking any criminal record and, except for certain types of work, the search is limited to the last ten years. Massachusetts has a five-year limit on consideration of misdemeanors but no time limit on searching and job-related consideration of felonies.

**Record of Arrest and Conviction in Public Employment and Licensing.** Some states restrict the use of these records only for public sector employment (Colorado, Connecticut and New Jersey).

**Arrest Without Conviction.** These laws prohibit only consideration of old arrest records in which conviction did not occur. There is no prohibition against using conviction records. (Employers may consider fresh arrests still pending final action, and may refuse to hire, or suspend an existing employee pending the outcome) (California, Rhode Island). Michigan prohibits consideration of misdemeanors, as well as arrest without conviction. Illinois prohibits consideration of sealed/expunged convictions, as well as arrests without conviction.

**Conviction Only.** Minnesota prohibits discrimination on the basis of conviction record unless there is a job relatedness.

**DISCRIMINATION IN REFERENCE CHECKS**

Anything you cannot ask during an interview, you cannot ask for or give in a reference check. You may not use it if it is volunteered by a source. One may not inquire into a job applicant's sex, age, religion, national origin, marital status, disability, and sexual
orientation. The illegal or suspect questions go well beyond merely asking about the sex, race, or marital status of an applicant. The earlier cited questions about young children was held to be sex discrimination. Questions, for example, about credit record or military service have been seen to be racial or national origin discrimination. So there are a number of seemingly neutral questions that have been used to discriminate and are now suspect.

This article does not allow space for full discussion of suspect and illegal areas of inquiry. However, the EEOC and State Equal Rights agencies have published guidance about illegal or suspect questions.

**RETALIATION**

There are a number of state and federal laws which prohibit retaliating against people who bring complaints or who witness about a violation. The individuals or enforcement agencies may have the right to file a retaliation case against both an employer who seeks information about an applicant's involvement in complaint processes and one who gives such negative information.

The following are the most frequent area of retaliatory references:

**Discrimination cases:** Negative comments about those who filed, or who acted as witnesses for, or who supported another in a state or federal discrimination complaint.

**National Labor Relations Act (and State Labor Laws):** This act protects “concerted activities.” This normally means that employers cannot blackball union organizers, supporters, or those who file grievances. However, “concerted activities” covers a number of pre-union or non-unionized circumstances. Whenever an employee addresses the common terms and conditions of employment it is probably concerted activity and protected from retaliation.

**Occupational Safety and Health Act:** Employees who draw attention to OSHA violations or cooperate in investigations are protected from retaliation.

There are a number of other laws which carry anti-retaliation provisions of one sort or another (Fair Labor Standards Act, Railway Labor Act, Employee Retirement Income Security Act, Vietnam Era Veterans Readjustment Assistance Act, and a variety of “whistle blower” provisions on other laws.

In order to stay clear of retaliation charges, a reference seeker should not ask about an applicant's grievance record, whether the applicant filed any cases, or whether the applicant was a union member, a “radical,” a “liberal,” an “activist,” an “agitator,” or even a “complainer.” These are all pieces of information which open the door to retaliation charges because they are likely to indicate that a person has exercised their legal rights in a complaint process or engaged in concerted activities. If you fail to hire an applicant after having received this sort of reference information, you will have the
burden of proving that you did not base any part of your decision upon that information.

The most frequently given retaliatory reference comments are by frustrated former employers who describe the applicant as a “troublemaker” or as having filed “excessive, petty grievances.” Any employer who gives such information has asked for a retaliation charge. Any employer who considers it in the hiring decision has joined the reference giver in retaliating. [For more information, request the article “Retaliation” by Bob Gregg, Boardman & Clark Law Firm.]

**MALICIOUS INTERFERENCE WITH EMPLOYMENT**

This is closely akin to retaliation. It occurs after a person has been hired and generally involves an unsolicited source contacting the present employer or customers and saying bad things. This usually happens when a former employer is angry at a person, is carrying a grudge, and is trying to get back at the former employee. If this causes a job to be lost or other harm in their employment, they may sue the unsolicited source.

Any suit under this area requires a showing of malice on the part of the source and requires that the harmed person already have an employment relationship to be harmed (job or job offer). Malice can be “implied” and can be found when there is evidence of ill will, spite, envy, hatred or revenge as a motive or “reckless disregard of the truth.” *Gibson v. Overnight Express* (Wis. 2004).

**DEFAMATION**

Most people are familiar with the terms “libel” and “slander.” “Defamation” is a more inclusive term to cover words which injure another person.

In the area of employment references, words which injure the employability of another by alleging a lack of capacity or fitness for a particular job are actionable. There has been a significant increase in the number of employment defamation cases.

The reference source can be held liable for giving defamatory information. The reference receiver is not liable for relying on the information, but may be held liable for further dissemination if the bad information is then communicated to others.

Generally, truth is not defamatory. Any truthful, verifiable negative comments are valid for reference purposes.

To be actionable as defamation, a reference statement must meet one of three criteria:

1. The information was known by the source to be untrue; or

2. The source had reason to know that the information might be untrue and did not bother to adequately check; or
3. The information was so broadly over-generalized as to be untrue.

The first criteria, “knowingly,” should be an obvious and easily avoided situation. The problems tend to arise with the second and third areas.

Situations under Number Two usually occur when a central personnel office or a successor supervisor provides reference information. These sources were not directly involved and have an incomplete picture of the applicant's performance. They may, also, get the applicant confused with someone else. The problem is created when they do not bother to adequately check. One typical case involved a source confusing the applicant with another former employee and stating that the applicant had a poor attendance record, an untrue statement. The source could easily have gone to the personnel records and double-checked their memory, but failed to do so. The applicant was not hired, but was successful in the suit.

The best way to avoid liability for this sort of error is to be sure that anything you report in a reference is verifiable and that you have indeed verified it.

The third situation, “overgeneralization,” arises when the reference source paints with too broad a brush. The source labels the entire character of the applicant rather than just their work-related behavior. Examples of reference words that have resulted in successful lawsuits against the sources are where the applicant was referred to as:

- crooked
- germ-ridden (in a health job)
- obnoxious
- an alcoholic
- a drunk
- paranoid son-of-a-bitch
- cheat
- half-bubble off level
- racist
- sex
- incompetent

These words are too broad. The word alcoholic, for example, implies that the person was a condition affecting their entire character. The former employer was not a physician and wasn’t qualified to make that diagnosis. They had not observed the person outside of work, and so had insufficient knowledge upon which to base the broad term.

Similarly, “obnoxious,” “incompetent,” or “ignorant” are broad terms which imply that the person is that way in all aspects of their life, not just related to a specific job or certain duties.
A reference source should not give such generalizations. As a receiver you do not want to hear them because they are of no use to you. You need specific examples of actual behavior. You need objective information.

Employers who use specific examples to illustrate their negative references have been consistently successful in winning defamation suits. Terms which have successfully met the defamation challenge include describing the applicant as:

- Had trouble getting along with co-workers. He was in several major arguments and frequently referred to others using derogatory names. (This is distinguished from the “paranoid S.O.B.” generalization. It is a report of actual behavior rather than a psychological conclusion.)

- Divulged confidences. On three occasions, it was discovered that she had told friends about the contents of another employee’s personnel file.

- Was caught taking money from the cash register and forced to resign. (This is distinguished from “a cheat” or “crooked,” because it focuses on an observed instance rather than trying to characterize the entire personality.)

- Came to work under the influence of alcohol six times. (Distinguished from “alcoholic” or “drunk,” in that this is objective observed behavior instead of a medical conclusion and focuses on work rather than on the entire scope of the applicant’s life.)

- Was the subject of 50% more customer complaints than the rest of the sales force. (Distinguished from “obnoxious” or “incompetent” because it focuses on a job-related area.)

- Had a poor attendance pattern (followed with supporting figures).

These are valid negative references upon which an employer can safely rely in eliminating a candidate from consideration. Always ask a source for instances of behaviors. If the reference source cannot back up their evaluations with specific instances or concrete examples, then do not consider that as a valid reference.

**DUTY TO GIVE NEGATIVE REFERENCES**

**False Positives**

Defamation suits are brought by those whose chances to get a job have been harmed by false, negative references. No job candidate will sue you for giving false positive information. There are situations in which an employer sees a reference check as an opportunity to “get rid” of an undesirable employee, so a falsely positive response is given. The new employer who relies on that false reference and hires the person, then gets to deal with the problem.
Courts may recognize a cause of action in this situation. Employers who have been harmed because of the new employee, might sue and recover damages from the person or company which gave the falsely positive reference.

An example of this situation would be:

Employer receives a reference request from another business. The job is handling the cash collections and account books of the business.

The employer knows that the job candidate in question has done very poorly in handling funds and books. In fact, their negligence in that area has resulted in the loss of $3,000 this past year. The books are a mess, and due to that person's mistakes in filing tax reports, the employer is now in trouble with the IRS and State Department of Revenue for underpayment and under withholding.

However, this looks like a golden opportunity to “get rid” of the problem worker without having to pay unemployment compensation or without the hassle of other legal entanglements. So the employer gives a good, positive reference about the person's abilities in this specific area.

The reference receiver reasonably relies on the information and hires the job candidate. Then that person causes the same sorts of money losses, messed up books and tax problems for the new employer.

The new employer probably has an action for the resulting damages against the reference giver.

There is no duty to give any reference. However, once you agree to give reference information, the solicitor has reasonable grounds to believe you. So you have a duty of good faith toward the reference solicitor. If you knowingly, intentionally give false information, you could be sued.

NEGLIGENT REFERENCE

The law is changing regarding an ex-employer’s obligation to provide a reference, especially where the prior employee could endanger others. There is a growing trend for courts to find a Duty of Care for the health, welfare and safety of the public. There are some jobs in which that health, welfare and safety could be a major issue. An ex-employer who withholds information, to the later detriment of others, may be held liable for that harm.

A good example is Kadlec Medical Center v. Lakeview Anesthesia Associates, 2006 U.S. Dist. Lexis 10328 (E.D. La., 2006). In that case, a hospital sought references before hiring an anesthesiologist. The former employer, Lakeview Anesthesia, gave the basic “verification of dates of employment,” bare bones reference. It failed to reveal that the anesthesiologist had been discharged for drug security violations and for being apparently under the influence of sedatives during an operation.
After being hired by the new employer, the anesthesiologist was so drug impaired during a minor operation that he put the patient into a brain-damaging coma. The patient never came out of the coma and her family sued the hospital and won over $8 million. That hospital and its insurance company then sued the previous employer for “negligent misrepresentation,” the failure to give a truthful, more detailed, reference. If the first employer had revealed the drug issue, the anesthesiologist would not have been hired. The coma would not have occurred. A jury agreed and awarded $4 million against the former employer for the failure to reveal significant information.

This does not mean you have to say every negative thing you know about a past employee. Most jobs do not trigger the Duty of Care for health, welfare and safety. Most instances of “poor performance” or failure to follow work rules are not severe enough as to create an “endangerment” of others. In the vast majority of reference instances, the duty to reveal would probably not be triggered. If, though, the ex-employee engaged in overtly problematic behavior, which could foreseeably harm others, the duty would come into play. This would be most likely where the person worked in the health care industry, was handling others’ finances or confidential information, was responsible for hazardous waste, or could otherwise seriously cause harm to person or property.

**QUALIFIED PRIVILEGE**

There is one more, very powerful protection that reference givers and receivers have from defamation suits. This is the Qualified Privilege, or “conditional privilege” as it is termed in some states.

The Qualified Privilege does not mean that an unsuccessful job applicant can't sue. Rather it is a defense that will defeat the suit.

The Qualified Privilege protects the reference even if the information was false. However, the source or receiver must have had an honest, good faith belief that the information or evaluation was true and reasonably taken due care to check.

The requirements one has to show to establish a Qualified Privilege are:

1. The information is reasonably necessary for the protection of the interests of one of the parties. (This criterion is automatically met in a job reference request since the prospective employer has a well-recognized interest in securing good employees.)

2. The scope of the inquiry is limited to what is reasonably necessary to protect the interest. (This means job-relatedness. Once the reference goes into family, religion, politics, or other non-directly job-related areas it has left the scope, and the Qualified Privilege disappears.)

3. The information is communicated on a proper occasion. (On the occasion of a hiring process and is solicited. A former employer who calls, unsolicited, to vent venom or get back at someone is outside the Qualified Privilege. Similarly where an employer
is on a fishing expedition to dig up dirt on present employees for office politics, there is no Qualified Privilege.)

4. The information is given to and confined to proper parties only. (“Proper parties” means the small group which must make the hiring decision. It can include the hiring committee, the personnel office as a whole, and top management who have any role in the hiring. If anyone involved in this small group leaks negative information about an applicant to others, then the Qualified Privilege ceases to exist for the company. The receivers have now become guilty of further spreading the defamation and are liable to the injured party.)

5. The communication is in a proper manner. (There is an absence of malice; the communication appears to be mainly based on objective criteria. It is in the regular course of business, and solicited and given by parties who have the apparent authority to be involved in a reference process).

6. The entire process is characterized by good faith.

It is necessary to prove all of these elements in order to establish the Qualified Privilege. Therefore, for the employer doing the hiring, it is wise to document references. A written record should be kept of (a) who, by name and title, asked for the reference; (b) who, by name and title, gave it; (c) what the reference was, in detail; and (d) the dates of solicitation and responses.

In order for the hiring process to work effectively, it is necessary for employers to receive, and prior employers to be able to give, candid reference information without fear of being sued for every negative comment. The courts have upheld the rights of reference solicitors and givers to engage in this process and have established the Qualified Privilege as a powerful protection for employers. The courts have also punished employers for improper reference activities in the areas of credit reports, discrimination, retaliation, malice and defamation. These danger areas can be avoided by some understanding of the law and a good use of common sense. This article cannot provide the common sense, but it has, hopefully, identified the danger areas and given some useful insight into how to avoid them.