

## State Laws and Their Impact on Use of Criminal Records for Employment Purposes

While the FCRA and EEOC provide a legal framework under which consumer reporting agencies and employers report and use criminal records, there are a number of state laws that limit the use of arrest and conviction records by prospective employers. These range from laws and rules prohibiting the employer from asking the applicant any questions about arrest records, to those restricting the employer's use of conviction data in making an employment decision. In some states, while there is no restriction placed on the employer, there are protections provided to the applicant with regard to what information they are required to report.

The states and references to law noted below do not represent an exhaustive compilation of every statute or regulation that may be applicable to your particular business or locale.

If you are aware of additional applicable law, please contact us and we will include it in this summary. This page is provided for your reference in an attempt to make this industry stronger and better informed, so we encourage your contribution.

PLEASE NOTE: This information should not be considered legal advice and should not replace competent legal counsel. We assume no liability for any errors or omissions within this document.

| State      | Employer's Use of Criminal Records   |
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| California | <p>California law places restrictions on the prospective employer's ability to ask about certain criminal records while protecting the applicant from any requirement to disclose certain arrest information.</p> <p>The Fair Employment and Housing Commission restricts employers from inquiring or seeking information on any applicant concerning any:</p> <ul style="list-style-type: none"><li>• Arrest or detention which did not result in conviction;</li><li>• Conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated;</li><li>• Misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed; or</li><li>• Arrest for which a pretrial diversion program has been successfully completed.</li></ul> <p><i>Reference: CA Code of Reg. §2787.4</i></p> <p>The CA Labor Code further prohibits employers from:</p> <ul style="list-style-type: none"><li>• asking an applicant to disclose;</li><li>• seeking from any source; or</li><li>• utilizing as a factor in hiring,</li></ul> <p>any information concerning an arrest or detention that did not result in conviction.</p> <p>Exceptions: Employers <b>may</b> ask about:</p> <ul style="list-style-type: none"><li>• Arrests where the applicant is out on bail or his own recognizance while awaiting trial.</li><li>• Certain arrests when the applicant will be employed at a health facilities and have access to patients, drugs, or medication.</li></ul> <p><i>Reference: CA Labor Code § 432.7.</i></p> |

| State                     | Employer's Use of Criminal Records   |
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| California<br>(continued) | <p>In the areas of public recreation, education, healthcare, and childcare, several state laws mandate fingerprint identification and criminal records inquiries from the California Department of Justice before hiring.</p> <p><i>Reference: CA Education Code; Health and Safety Code; and Welfare and Institutions Code; and Financial Code. (Due to the complexity of these laws, specific citations are intentionally not provided.)</i></p>   |
| Colorado                  | <p>Employers are prohibited from requiring an applicant to disclose any information contained in sealed records. An applicant need not answer any question concerning arrest or criminal records that have been sealed and may state that no such action has ever occurred. An application may not be denied solely because of the applicant's refusal to disclose arrest and criminal records information that has been sealed.<sup>1</sup></p> <p><i>Reference: CRS 24-72-308</i></p>  |
| Florida                   | <p>Persons with a sealed criminal history record may lawfully deny or fail to acknowledge arrests covered by sealed records, except when applying for positions with direct contact with children, the developmentally disabled, the aged, or the elderly and most healthcare positions. (Providers generally cannot report the existence of sealed or expunged records)</p> <p><i>Reference: FS §943.059</i></p>  |
| Georgia                   | <p>Certain first offender crimes in which the offender has been discharged without court adjudication of guilt are not reportable under Georgia law and a notification of discharge and exoneration is to be placed upon the record by the clerk of court. The discharge is not considered a conviction of a crime and may not be used to disqualify a person in any application for employment. Exception: Registration requirements with the state sexual offender registry will be followed, if applicable.</p> <p><i>Reference: GA Code §42-8-60 through 42-8-63</i></p>   |
| Hawaii                    | <p>It is an unlawful discriminatory practice for an employer to refuse to hire based on an applicant's arrest and court record. Criminal conviction records may only be considered provided there is a rational relationship between the conviction record and the duties and responsibilities of the position. The inquiry into and consideration of conviction records can only occur after a conditional offer of employment has occurred; however, the offer of employment may be withdrawn if a conviction record is found to exist that bears a rational relationship to the job. Employers may not examine conviction records older than 10 years.</p> <p>Exceptions: The law provides for broader use of conviction information in banking, education, childcare, and in homes for the care of developmentally disabled adults.</p> <p><i>Reference: HRS §378.2 – §378.3</i></p> |

| <b>State</b> | <b>Employer's Use of Criminal Records</b> |
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Hawaii  
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Criminal history records checks are required on prospective employees in public and private education, adult foster or developmental disabilities domiciliary homes, and childcare facilities.

*Reference: HRS §846-43 - §846.44, §333F-22, §346-154*

Idaho

In its pre-employment inquiry guide, the Idaho State Human Rights Commission notes as "high risk" any question about:

- Arrest records, without proof of business reasons for knowing this information, and
- Conviction records, which should not be an absolute bar to employment unless the number, nature, and recentness make the candidate unsuitable.

Criminal history checks on prospective employees in the areas of education, childcare, personal care, and healthcare are required.

*Reference: I.S. §33-130, 39-1105, 39-5604, 54-4603*

Illinois

Unless otherwise authorized by law, it is a civil rights violation for employers to inquire into or use the fact of an arrest or criminal history record information ordered expunged, sealed or impounded as a basis to refuse to hire.<sup>1</sup>

*Reference: 775 ILCS 5/2-103*

Kansas

Prospective employers are prohibited from requiring a job applicant to inspect or challenge their own criminal history record information for the purpose of obtaining a copy of the person's record. An employer may require an applicant to sign a release allowing the employer to access the criminal record to determine the applicant's fitness for employment. No employer will be liable for any employment decision based upon criminal history record information, provided the information that led to the employment decision reasonably bears upon the applicant's trustworthiness, or the safety or well-being of the employer's employees or customers.

*Reference: KS §22-4710*

Job applicants whose arrest record, conviction, or diversion of crime has been expunged may state that they have never been arrested, convicted, or diverted of such crime. Exceptions: Applicants for jobs in certain state agencies and commissions and for positions in private security.

*Reference KS §21-4619*

The Kansas Human Rights Commission employment inquiry guidelines notes the following as inadvisable pre-employment inquiries:

- Any inquiry into number or kinds of arrests and,
- Any inquiry into a conviction record that is not substantially related to the applicant's ability to perform job duties.

| State | Employer's Use of Criminal Records |
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| Maryland | An employer may not require an applicant to disclose information regarding criminal charges that have been expunged. <sup>1</sup> Likewise, an applicant need not answer questions about criminal charges that did not result in a conviction or convictions that have been pardoned. An employer may not refuse to hire a person solely because of his refusal to answer questions about charges that have been expunged. |
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*Reference: Code of MD § 27-740*

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| Massachusetts | Employers and their agents may not inquire into or maintain records related to the following information regarding a potential employee: <ul style="list-style-type: none"><li>• An arrest, detention, or disposition that did not result in conviction, or</li><li>• A first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or</li><li>• Any conviction of a misdemeanor where the date of such conviction or the completion of incarceration, whichever date is later, occurred five or more years prior to the date of application for employment, unless such person has been convicted of any offense within the five years immediately preceding the date of such application for employment.</li></ul> Furthermore, an employer may not discriminate against an applicant for his failure to furnish such information. |
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*Reference: MGL/21-151B*

Facilities caring for the elderly and disabled, and long-term care facilities must obtain *all* available criminal offender record information concerning an individual before hiring.

*Reference: MGL/6-172C & 172E*

An application for employment used by an employer which seeks information concerning prior arrests or convictions of the applicant shall include the following statement:

"An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a sealed record on file with the commissioner of probation may answer "no record" to an inquiry herein relative to prior arrests or criminal court appearances. In addition, any applicant for employment may answer "no record' with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution."

*Reference: MGL/276-100A*

| <b>State</b> | <b>Employer's Use of Criminal Records</b> |
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| Michigan | Under state civil rights law, an employer shall not, in connection with an application for employment, make or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result. Exception: This does not apply to information relative to a felony charge before conviction or dismissal. |
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*Reference: MCL 37.2205a*

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| Minnesota | The Minnesota Department of Human Rights' pre-employment inquiries guide states that inquiries into a potential employee's criminal conviction should not be an absolute bar to employment absent a bona fide occupational qualification. |
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*Reference: Hiring, job interviews and the Minnesota Human Rights Act, Prohibited Pre-Employment Inquiries and Disability Discrimination*

Criminal history background checks are required for positions with public and private schools, children's service providers, nursing homes and other adult care facilities.

*Reference: MS §123B.03, §245A.04, §299C.62*

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| Missouri | The Missouri Commission on Human Rights' pre-employment guidelines states questions related to arrest and conviction records are inadvisable unless related to the applicant's ability to perform a specific job. |
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*Reference: Missouri Department of Labor and Industrial Relations Commission on Human Rights Pre-Employment Inquiries*

Criminal records checks are required before hiring school bus drivers, persons having contact with adult patients or residents, and employees of mental health facilities or programs.

*Reference: MRS §302.272, §630.317 and S. 48, L. 2001*

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| Nevada | The Nevada Equal Rights Commission's pre-employment guidelines state questions regarding arrests are unacceptable. Questions regarding convictions must be accompanied by a statement that a conviction will not necessarily disqualify the applicant from the job. |
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*Reference: Nevada Equal Rights Commission Pre-Employment Inquiry Guide*

Criminal history information must be obtained for non-licensed persons seeking employment in school districts, nursing agencies, and labor organizations representing gaming casino employees.

*Reference: NRS §391.100, §449.179, §463A.030*

| <b>State</b> | <b>Employer's Use of Criminal Records</b> |
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| New York | Unless allowed by state law, it is considered discriminatory for an employer to inquire about or act on information regarding an arrest that did not result in conviction, unless the arrest is still pending. |
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*Reference: NYCL Executive Law 15.296-16*

It is also a discriminatory practice to deny employment by reason of conviction of one or more criminal offenses unless several factors are considered, including:

- The bearing the criminal offense will have on the ability of the person to perform the duties of the job.
- The time that has elapsed since the occurrence of the offense.
- The legitimate interest of the employer in protecting property, and the safety and welfare of the specific individuals or the general public.

*Reference: NY Correction Law 23-A-752*

Criminal records checks are required for prospective employees in education and childcare.

*Reference: NY Education Law, Title II, §1604, 1709, 1804, 2554, 2590, & 3035 and NY Social Services Law, Art. 6, Title 1, §390*

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| North Carolina | The subject of an expunged record may legally refrain from responding to any inquiry regarding expunged entries related to arrest or trial. |
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*Reference: NCGS §15A-146*

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| Ohio | Employers are prohibited from inquiring about a job applicant's juvenile arrest record that has been expunged and the applicant may respond as if the record does not exist. The applicant may not be the subject of any adverse action because of the arrest or their response. |
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*Reference: Ohio Revised Code §2151.358*

In any application for employment, a person may be questioned only with respect to convictions not sealed, unless the question bears a direct and substantial relationship to the position for which the person is being considered.

*Reference: Ohio Revised Code §2953.33*

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| Oklahoma | Employers may not require an applicant to disclose any information contained in sealed arrest and criminal records. The applicant need not provide any information about sealed records and may state that no such action has ever occurred. The employer may not deny the application because of the applicant's refusal to disclose such information. |
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*Reference: 22 O.S. § 19*

| State        | Employer's Use of Criminal Records   |
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| Oregon       | <p>Employers cannot refuse to hire based upon a juvenile record that has been expunged.</p> <p><i>Reference: ORS §659.030</i></p>  |
| Pennsylvania | <p>An employer may consider felony and misdemeanor convictions only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied.</p> <p><i>Reference: PCS 18-9125</i></p> <p>Public and private schools and health care and nursing facilities are all required to obtain a criminal history record report with applications for employment.</p> <p><i>Reference: PCS Title 24, Ch. 1, Art. 1, §1-111 and Title 35, Ch. 5, §10225.502</i></p>  |
| Rhode Island | <p>Employers are prohibited from inquiring in employment applications about arrests that have not resulted in conviction. Exception: Positions related to law enforcement.</p> <p><i>Reference: RIS §28-5-7</i></p> <p>A person whose conviction of a crime has been expunged may state in an application for employment that he or she has never been convicted of that crime. Exception: Applicants for licenses in the area of law enforcement and education must disclose the fact of a conviction.</p> <p><i>Reference: RIGL §12-1.3-4</i></p> <p>Criminal records checks are required before hiring for positions in public and private education, nursing facilities, home nursing care, residential care and assisted living facilities, mental health facilities and programs, child care, and youth services.</p> <p><i>Reference: RIGL §16-2-18.1, §16-48-1.5, §27-17-34, §23-17.4-27, §40.1-25.1-1, §40-13.2-4</i></p> |
| South Dakota | <p>The Pre-employment Inquiry Guide published by the Division of Human Rights classifies any inquiry or check into a person's arrest, court or conviction record that is not substantially related to a function of employment as a "suspect inquiry".</p> <p><i>Reference: SD Division of Human Rights Pre-employment Inquiry Guide</i></p> <p>Criminal records checks are required for prospective employees in the areas of education and child welfare.</p> <p><i>Reference: SDCL §13-10-12 - §13-10-13 and §26-6-14.3</i></p>   |

| <b>State</b> | <b>Employer's Use of Criminal Records</b> |
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| Texas | The release or use of expunged felony or misdemeanor arrest records for any purpose is prohibited and the person whose records are expunged may deny the arrest and the existence of the expunction order. |
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*Reference: Texas Code of Criminal Procedure, Art. 55.03*

A person whose juvenile records have been sealed is not required in any application for employment to state he or she has ever been the subject of a juvenile court proceeding.

*Reference: Texas Family Code, Title 3, §58.003(j)*

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| Utah | The Utah Pre-Employment Inquiry Guide states it is an improper pre-employment inquiry to ask about arrest records. It is proper to ask about a felony conviction; however, the inquiry is advisable only if job-related. |
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*Reference: UT Administrative Code, Rule 606-2, U - V*

Criminal background checks are required for potential employees in public and private schools, health and child care facilities, and agencies providing services for children.

*Reference: UT Code §53A-3-410, §53A-6-401, §53A-19-104, §26-21-9.5, §26-39-107, §62A-4a-413*

A person whose arrest record has been expunged may respond to any inquiry as though the arrest did not occur, unless otherwise provided by law.

*Reference: UT Code §77-18-10*

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| Virginia | Employers are prohibited from requiring applicants to disclose information concerning arrests or criminal charges that have been expunged. Likewise, applicants are not required to answer questions regarding arrests or criminal charges that did not result in conviction and have been expunged. |
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*Reference: VA Code §19.2-392.4*



| State | Employer's Use of Criminal Records |
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| Washington | The following examples of unfair inquires apply when made in reference to job application forms, pre-employment interviews or any other type of inquiry made of job applicants. |
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- Arrest Records

Inquiries concerning arrests that do not include whether charges are still pending, have been dismissed, or led to a conviction of a crime involving behavior that would adversely affect job performance, and the arrest did not occur within the last ten years.

- Conviction Records

Inquiries concerning convictions and imprisonment that do not relate reasonably to job duties and did not occur within the last ten years.

Exempt from this rule are law enforcement agencies and state agencies, school districts, business and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults.

*Reference: WAC §162-12-140*

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| Wisconsin | No employer may engage in any act of employment discrimination against any individual on the basis of an arrest or conviction record. |
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*Reference: WS §111.321*

It is considered employment discrimination to request information about an arrest not pending unless the applicant is applying for a bondable position.

It is **not** considered employment discrimination to refuse to hire an individual based on a arrest or conviction record if:

- The circumstances of the charge substantially relate to the circumstances of the particular job; or
- The individual is not bondable where such bond is required by law or established business practice of the employer.

*Reference: WS §111.335*

Criminal history record verification is required for positions in public education, and in any facility or service regulated or licensed by the Department of Health and Family Services.

*Reference: WS §48.685 and 50.065*