

# Q&AS ON HIRING EX-OFFENDERS

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## A GUIDE FOR GEORGIA EMPLOYERS

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**What is my potential liability if my employee who is an ex-offender commits a criminal act against another employee or third party?**

In Georgia, there is a law that protects employers from negligent hiring and retention claims by creating a presumption of “due care” for hiring and employing individuals with criminal backgrounds who have received a “Program and Treatment Completion Certificate” from the Department of Corrections or a grant of pardon from the State Board of Pardons and Parole. An employer’s presumption of “due care” may be rebutted by evidence demonstrating the employer knew or should have known relevant information that extended beyond the scope of the certificate or pardon. For example, if an employee has demonstrated a pattern of violence which is recent and places a reasonable employer on notice that the individual is likely to commit such acts against other employees, customers or other third parties, an employer could be held liable.

If an individual with a criminal background does not have a “Program and Treatment Completion Certificate” from the Department of Corrections or a grant of pardon, an employer would nonetheless generally not be liable for the criminal acts committed by such individual while on duty unless the employer was on notice that the employee had a propensity to commit such acts. In such claims, the injured person must typically prove the injurious behavior was to be expected based on past behavior that demonstrated that the employee was dangerous.

**Is there insurance or other protections available to cover my potential liability?**

Georgia offers insurance bonds to employers who hire risky populations through the Federal Bonding Program under the U.S. Department of Labor. Many General Liability insurance policies offered by private carriers will cover claims by third parties arising out of the criminal acts of employees, but you should consult your particular policies and discuss this with your broker. Injuries to employees caused by co-workers arising out of employment are generally covered by workers’ compensation, which would be the exclusive remedy.

**Are their tax and other financial incentives available to employers who hire individuals with criminal records?**

The U.S. Department of Labor offers tax breaks for organizations who hire criminal offenders through the Work Opportunity Tax Credit Program. The tax credit applies to employers who hire a felon or “an individual who was convicted of a felony and who is hired not more than one year after the conviction or release from prison.” The Department of Labor offers tax breaks for organizations who hire criminal offenders through the Work Opportunity Tax Credit Program. The tax credit applies to employers who hire a felon or “an individual who was convicted of a felony and who is hired not more than one year after the conviction or release from prison.”

Georgia offers employers that employ a qualified parolee in a full-time job for at least 40 weeks during a 12 month period an income tax credit of \$2,500.00 for each qualified parolee.

**Is it illegal for an employer to refuse to hire applicants with a criminal record?**

It can be. Blanket exclusions of individuals who have criminal records may constitute employment discrimination under Title VII of the Civil Rights Act. The Equal Employment Opportunity Commission (EEOC), in its Enforcement Guidance on the Consideration of Arrest and Conviction Records, recommends the following guidelines to employers when considering job applicants who have criminal records:

1. Employers should not ask about convictions on job applications. Inquiries should be limited to convictions for which exclusion would be job-related for the position.
2. Employers should avoid policies that automatically exclude people from employment based on only certain criteria (such as criminal status) - particularly “blanket exclusion” policies.
3. Employers should be cautious about excluding employees from the hiring process based on their criminal record, especially if the criminal offense is unrelated to the job.
4. Employers should consider other factors relative to the conviction including the facts or circumstances of the offense/conduct, the number of offenses the individual has been convicted of, the age of the convictions, the length and consistency of employment history before and after offense, rehabilitation efforts, and references.
5. Employers should give all applicants a chance to explain their criminal records.

In summary, these decisions should be made on a case by case basis considering job-related factors.

In addition, under the Americans with Disabilities Act (ADA), it is unlawful to exclude an applicant with a past drug use conviction based on the assumption that they are a current user of illegal drugs.

**What are my obligations to notify an applicant if I am conducting a criminal background check or rejecting them because of their conviction record?**

If you get background information (for example, a credit or criminal background report) from a company in the business of compiling background information, there are additional procedures the Fair Credit Reporting Act (FCRA) requires beforehand:

1. Tell the applicant or employee you might use the information for decisions about his or her employment. This notice must be in writing and in a stand-alone document. The notice cannot be in an employment application. You can include some minor additional information in the notice (like a brief description of the nature of consumer reports), but only if it doesn't confuse or detract from the notice.
2. If you are asking a company to provide an "investigative report", which is a report based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle, you must also tell the applicant or employee of his or her right to a description of the nature and scope of the investigation.
3. Get the applicant's or employee's written permission to do the background check. This can be part of the document you use to notify the person that you will get the report. If you want the authorization to allow you to get background reports throughout the person's employment, make sure you say so clearly and conspicuously.
4. Certify to the company from which you are getting the report that you:
  - notified the applicant and got their permission to get a background report;
  - complied with all of the FCRA requirements; and
  - don't discriminate against the applicant or employee, or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

When taking an adverse action (for example, not hiring an applicant) based on background information obtained through a company in the business of compiling background information, the FCRA has additional requirements:

1. Before you take an adverse employment action, you must give the applicant or employee:
  - a notice that includes a copy of the consumer report you relied on to make your decision; and
  - a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," which you should have received from the company that sold you the report.
2. After you take an adverse employment action, you must tell the applicant or employee (orally, in writing, or electronically):
  - that he or she was rejected because of information in the report;
  - the name, address, and phone number of the company that sold the report;
  - that the company selling the report didn't make the hiring decision, and can't give specific reasons for it; and
  - that he or she has a right to dispute the accuracy or completeness of the report, and to get an additional free report from the reporting company within 60 days.

There are also recordkeeping requirements regarding conducting background checks on applicants for employment. The EEOC requires any personnel or employment records you make or keep (including all application forms, regardless of whether the applicant was hired, and other records related to hiring) to be preserved for one year after the records were made, or after a personnel action was taken, whichever comes later. The FTC requires that when you dispose of the reports and any information gathered from them, it be done in a secure manner. That can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can't be read or reconstructed.

## **What are some Best Practices for employers for considering applicants who are ex-offenders?**

- **Treat applicants with similar criminal records consistently.** For example, do not refuse to consider Hispanic applicants who have criminal records if you consider applicants of other national origins who have the same or similar criminal records.
- **Avoid using an employment policy or practice that excludes people with certain criminal records** if the policy or practice significantly disadvantages individuals of a particular race or national origin, and does not accurately predict who will be a responsible, reliable or safe employee. Do not draw unwarranted conclusions based on an applicant's prior criminal history, such as single violation would likely be repeated.
- **If you ask applicants for criminal history information, consider waiting until later in the hiring process to do so.** That way, you'll have the opportunity to consider applicants' qualifications for the job before you assess the relevance, if any, of the applicants' criminal history.

However, in some circumstances, you may need to request criminal history information early in the hiring process to comply with certain laws or regulations, such as certain businesses such as day care centers and nursing homes.

- **Determine how the applicant's criminal history relates to the risks and responsibilities of the job.** Among other things, consider the nature of the crime; the time that has passed since the criminal conduct occurred; the nature and duties of the job, rehabilitation efforts by the applicant, and the applicant's record since the conviction.
- **Treat arrest records differently than conviction records.** It is generally unlawful to make hiring decisions based on arrests that did not result in conviction.
- **Consider reviewing the accuracy and relevance of a conviction record before basing an employment decision on that record.** Conviction records are usually proof that a person participated in criminal activity. However, in certain circumstances, you may decide not to rely on a conviction record when making an employment decision. For example, you may conclude that the record is inaccurate or outdated.
- **Give applicants an opportunity to explain their criminal history.** Inform applicants if they may be excluded from consideration because of prior criminal conduct (this may be required under the FCRA). Provide them with an opportunity to respond, and consider reevaluating them based on their explanation.
- **Comply with all Notice requirements under the FCRA.**