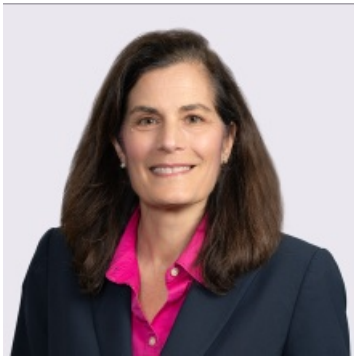


# Criminal Background Checks in Manufacturing Industry: Managing Employers' Legal Obligations

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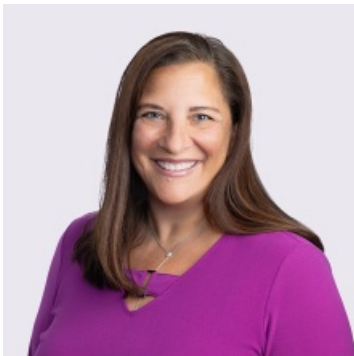
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Smart hiring often includes a post-offer criminal background check on the job candidate to help employers make informed decisions. This practice can reveal potential employment risks like theft, workplace violence, or workplace substance abuse. Workers with a criminal record, however, can make up a diverse and motivated pool of talent for manufacturing employers in a tight labor market. Given the pressing need to fill critical manufacturing openings, employers must understand their obligations.

### Most Recent Legal Challenge

The Equal Employment Opportunity Commission (EEOC) has long been concerned with the potential for workplace discrimination in criminal background checks (see 2012 [Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act](#)). In April 2024, the EEOC sued an employer for using a facially neutral background check process perceived to have an adverse impact on minorities. At issue is this employer's practice of refusing to hire job applicants considered to have failed a criminal background check based on a pass/fail matrix, rather than an individualized assessment. This employer allegedly made hiring decisions using automatic disqualifiers without the legal basis to do so.

Having a criminal history is not a protected class under federal law, *per se*. The EEOC, however, objects to an employer using automatic disqualifiers based on a criminal record given the potentially disparate impact on minorities. In the pending case, at issue is whether the approach of automatic disqualifiers has led to disproportionate disqualification of applicants who are Black, Native American, or mixed race. The higher number of disqualifications track with demographic data showing higher levels of criminal convictions among those populations.

The EEOC identified four aspects of the employer's policy at issue that raised concerns, presenting a compliance roadmap. First, decisions were made without contacting the job applicant to request additional information not found in the report. Second, decisions to deny employment based on the report were not required to be reviewed by anyone beyond the initial screener. Third, the information about the report was not communicated to the job applicant (for verification). Fourth, the job applicant had no recourse to appeal or seek reconsideration about the decision. According to the EEOC, these are key elements of an individualized assessment process. In the pending lawsuit, the employer defends its policy, arguing it is job related and consistent with business necessity. This impacts a large class of people; the stakes are high.

### Minimizing Risks: Individualized Assessment

Generally, the concept of an individualized assessment is to consider each person's criminal history on a case-by-case basis, contemplating the position sought, among other factors. The EEOC recommends that when an applicant is screened out by a

criminal background check, the employer speak with the prospective hire and allow the person to explain or address the criminal history *before* the employer makes a hiring decision. This process should be interactive, involving an interview and review of supplemental information. The EEOC identifies three specific areas to focus on, commonly referred to as the “Green Factors”, (i) the nature and gravity of the offense or conduct, (ii) the amount of time that has passed, and (iii) its relevance to the nature of the job sought.

Employers should also ask about any mitigating facts or circumstances of the past conduct; the number of offenses; how long it has been since the conviction or release from prison; rehabilitation efforts; character references; and employment history before and after the offense, particularly evidence that the applicant has successfully done this kind of work without engaging in criminal conduct. Evidence of an arrest without a conviction should not be given weight, though employers in most jurisdictions can consider the conduct underlying an arrest if it is relevant. In short, the individualized assessment allows a candidate to present information minimizing the impact of a conviction on job performance.

### Create Written Policy and Position Specific Matrix

While automatic pass/fail disqualifiers should be avoided, having clear written guidelines and a risk-assessment matrix can still assist manufacturers ensure consistency. For instance, a screener could be given a form that lists several factors for weighing the risk of a candidate’s criminal background, such as how long ago the criminal act occurred, its severity, and how related it is to job duties. Each category can then be ranked from “least concern” to “needs review.” Those with significant risk factors should then have a clear and thorough assessment provided to the designated decision maker for final determination.

### Continuously Review the Process to Ensure Consistency

Once the written guidance and matrix are in place, hiring staff should be continuously trained in its use. This training should be documented and audited periodically. Ensure hiring staff are communicating with and properly escalating qualified applicants notwithstanding criminal backgrounds.

### Ensure Decisions Adhere to State and Local Law

Many jurisdictions have instituted “ban the box” laws that prohibit criminal history inquiries directly on a job application or other specific requirements. For instance, Article 23A, New York State law, requires employers to conduct an eight-step analysis prior to denying employment to an applicant with a criminal history. Atlanta, like many other jurisdictions, has explicitly made criminal history a protected class from employment discrimination, and makes it illegal to refuse to hire a person for criminal background unless an individualized assessment has been done.

### Special Considerations for the Manufacturing Industry

The extensive use of staffing agencies by manufacturers and hiring pressures present an additional legal risk. Even if a manufacturer employer is not directly involved in hiring decisions made by a staffing agency, it can still be held liable for any deficient practices. It is critical to inquire into the staffing agency’s hiring practices before contracting with them. Similarly, when manufacturers are engaged in rapidly scaling up operations it is important that individual assessments are still being conducted before denying

employment, whether by the staffing agency or manufacturer.

### Best Practices

The EEOC is concerned about “systemic discrimination,” a pattern or practice that has a broad effect on classes of jobseekers. Avoiding hard and fast rules, such as “we have a policy against hiring people with a felony conviction,” is advisable. Likewise, manufacturing employers should avoid contracting with staffing agencies that implicitly or explicitly fall into the trap of having such inflexible rules.

Manufacturers should become familiar with the EEOC’s Guidance and the “Green Factors.” While conducting individualized assessments, allow the candidate an opportunity to provide explanations of a background check. Screeners should escalate concerns about a candidate’s criminal background to a manager for final decision. Finally, make sure to check state and local laws for other hiring requirements.

(Summer Associate Warne Goodman contributed to this article.)

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