

Crossing The Minefield Of Criminal Background Checks

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The EEOC's recent guidance on criminal background checks spawned numerous legal updates, alerts and webinars (including ours) talking about the new limitations for employers on pre-employment inquiries and applications. In Indiana, this focus has underscored the importance of two *other* laws regarding background checks:

1. The federal Fair Credit Reporting Act (FCRA), and
2. July 1 changes to Indiana's law on an individual's criminal history (HEA 1033).

As a reminder, an employer that relies on a third party for criminal history reports has waded into coverage under the FCRA. Of course, compliance with the FCRA is critical: for example, employers often get permission for a background check by including a paragraph at the end of the job application. But, that's *not* allowed; the FCRA requires a *separate* notice and

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authorization. Make sure your organization has the checklist of items required by the FCRA, and upon finding a negative criminal history, you give the applicant a reasonable time to dispute the information.

Second, Indiana's HEA 1033, which took effect July 1, 2012, further restricts what employers can ask prospective employees. Last year, Indiana Code 35-38-8-7 was drafted to protect individuals whose criminal records were ordered "restricted" (e.g., sealed or expunged). The law allows the person to "legally state on an application for employment...that the person has not been arrested or convicted..." This year, Indiana amended the law to provide further protections. More specifically, **"employers may not ask an employee, contract employee, or applicant whether the person's criminal records have been sealed or restricted."**

There are penalties, too: employers who ask such information "commit[s] a Class B infraction," which can amount to a judgment of up to \$1,000. Additionally, the changes to Indiana's law allow an individual with a non-violent criminal history to have a Class D felony reduced to a Class A misdemeanor three years after the sentence is complete (assuming other qualifications have been met, too).

So, as you're screening for new hires, know that following the EEOC's guidance isn't always enough. Let's be careful out there.