TO: Indiana Public Libraries

FROM: Indiana State Library

RE: **Background/Criminal History Reports**

DATE: December 31, 2013

While there is no federal or Indiana law prohibiting the consideration of criminal history information in the hiring process, according to the U.S. Equal Employment Opportunity Commission (“EEOC”), “An employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.”

The EEOC states that discrimination can occur if multiple job applicants have similar criminal records but the criminal records are only held against certain job applicants due to their race, national origin, or another protected characteristic.

The EEOC also states that discrimination can also occur if an employer’s hiring policy with regard to criminal records results in disproportionately excluding people of a particular race or national origin. According to the EEOC, the employer must be able to show that the exclusions are “job related and consistent with business necessity”. The EEOC recommends that employers consider, at minimum, “the nature of the crime; time elapsed since the criminal conduct occurred; and the nature of the specific job in question.” The EEOC also recommends the employer’s policy provide “an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity.”

While inquiring about criminal history on job applications is not currently against the law, the EEOC recommends that employers refrain from inquiring about convictions on employment 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 states that in order to establish that excluding an applicant due to criminal conduct was job related and consistent with business necessity, the employer should show that specific criminal conduct and its dangers were specifically linked with the “risks inherent in the duties of a particular position.”

(Source/for more information see: <http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm> )

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Recent changes to Indiana’s laws related to criminal history reports restrict the type of information that may be provided in response to criminal history inquiries and the types of inquiries employers may make with regard to a job applicant’s criminal history.

Under Indiana law, it is unlawful discrimination and a violation of a job applicant’s civil rights for an employer to refuse to employ him/her because of conviction or arrest record that has been expunged or sealed. The law indicates that employers may only inquire as to an applicant’s criminal history in terms that exclude expunged convictions and arrests. “A person whose record is expunged shall be treated as if the person had never been convicted of the offense” (I.C. 35-38-9-10) If asked about criminal history by an employer on a job application or at an interview, job applicants do not have to disclose conviction or arrest records that have been expunged.

Additionally, courts are prohibited from releasing information related to the allegation of infractions:

* That are not prosecuted or are dismissed;
* where the person was adjudged not to have committed the infraction; or
* is adjudged to have committed the infraction and the adjudication is subsequently vacated. (IC 34-28-5-15)

Infractions are low level offenses, an example of which is a moving violation resulting in a traffic ticket.

With respect to employment inquiries, Indiana law currently prohibits criminal history providers from knowingly providing a criminal history report that:

* Contains inaccurate information, or
* information relating to a record that has been expunged,
* has been marked as restricted from public disclosure or removed from public access, or
* contains information about certain felony convictions that have been converted to or recorded or entered as a misdemeanors.

Beginning July 1, 2014, criminal history providers will be further restricted to providing only criminal history information that relates to a conviction. It will be unlawful for criminal history providers to provide information relating to an infraction, arrest or charge that did not result in a conviction. (I.C. 24-4-18-6)

IC 24-4-18-2 defines “criminal history provider” as a “person or organization that compiles a criminal history report and either uses the report or provides the report to a person or an organization...”

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According to the Federal Trade Commission (FTC), employers should get written permission from job applicants prior to requesting background reports “from a credit reporting company or any other company that provides background information.” If an employer is using a company to provide a background report, the employer must provide the job applicant with a written notice separate from the job application stating that the information in the background report may be used to make a decision with regard to employment. Also, if the job applicant is going to be denied the job, or promotion (or if the job applicant or employee will be demoted, reassigned, or terminated due to information found in the individual’s background report) the employer must first provide the individual with a copy of the report and “a document called *A Summary of Your Rights Under the Fair Credit Reporting Act* before taking adverse action.” The Summary or Rights document may be found at: <http://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>

If an employer proceeds in taking adverse action against an employee or job applicant based on information in a background report, the employer must provide the employee or job applicant with the following information:

* Name, address, and phone number of the company that supplied the credit report or background information;
* A statement that the company that supplied the information didn’t make the decision to take the adverse action and cannot give any specific reasons for it; and
* A notice of the individual’s right to dispute the accuracy or completeness of any information in his/her report and to get an additional free report from the company that supplied the credit or other background information if asked for it within 60 days.

(Source/for more information see: <http://www.consumer.ftc.gov/articles/0157-employment-background-checks> )