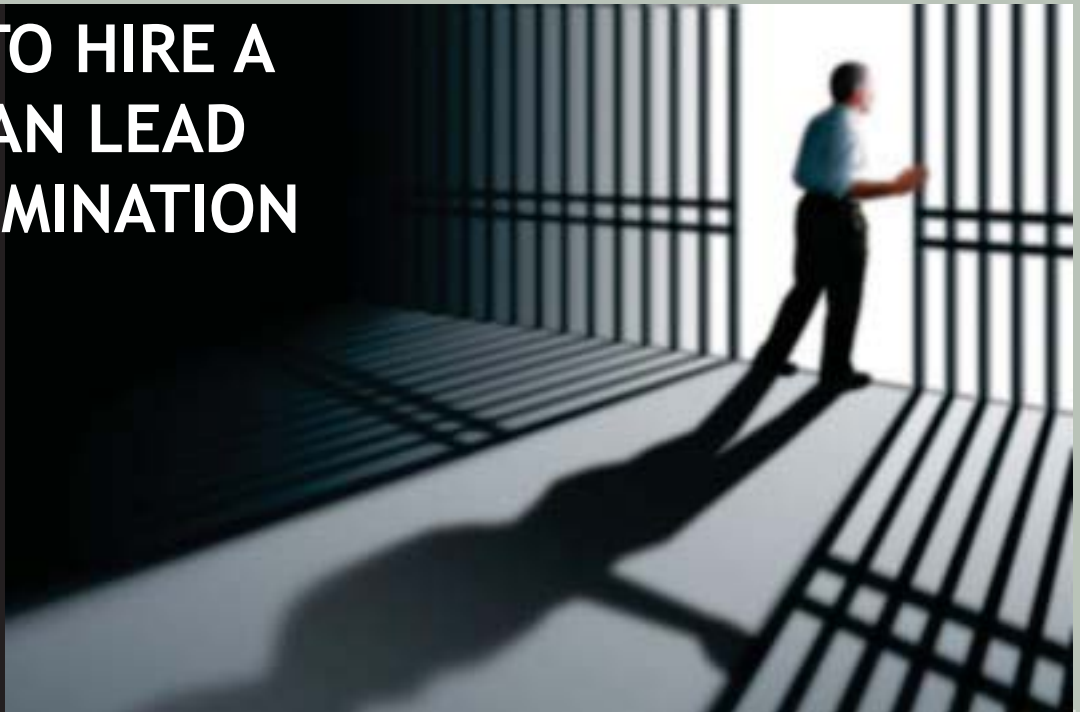


REFUSING TO HIRE A CONVICT CAN LEAD TO A DISCRIMINATION CHARGE

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When hiring personnel, it makes sense to avoid applicants with criminal histories. An applicant with a criminal history may be more likely to act in ways that could cause trouble for your company. So it may be a surprise to find that companies cannot have policies that automatically exclude persons with criminal histories.

How could this be? The Department of Labor and the EEOC have opined that policies that exclude all individuals based on criminal records and that do not consider the nature and age of the offense may violate federal laws. According to the Department of Labor and the EEOC, this is because the policy may have an adverse impact on certain racial or ethnic groups.

If an employer's policy of not hiring applicants who have been convicted of crimes has a negative impact on a racial or ethnic group, the company may still avoid a claim of racial discrimination by the EEOC. To avoid such a claim, the employer should be able to show that the policy is related to the job and is a business necessity. It can do this by following guidelines published by the EEOC. However, these guidelines are all but impossible to comply with. Alternatively, the employer can analyze how the policy relates to the job and whether the policy is a business necessity by using a three factor test. The three factors are

1. the nature and gravity of the offense;
2. the amount of time that has passed from the offense or sentence; and
3. the nature of the job the applicant is seeking.

The EEOC has produced a list of "best practices" to follow in avoiding liability for discrimination. They include

1. making sure any policy requires independent

assessment of the applicant;

2. narrowing the policy to

- a. the essential job requirements and circumstances of the jobs themselves;
- b. the specific offenses, or types of offenses, that may demonstrate they are unfit for the job; and
- c. an appropriate duration between the offense and when the applicant is being considered;

3. not asking for a criminal history, or limiting the questions to convictions that would be job-related to the particular position consistent with business necessity; and

4. keeping the applicant's criminal history confidential.

It seems unimaginable that the EEOC would charge a roofer in Arizona with discrimination based upon race or ethnic groups because the most of the roofing workforce is some type of ethnic minority and many have criminal records. However, government workers are unpredictable. You never know when a government enforcement worker will decide to try to make a name for him or herself by bringing a discrimination claim based upon a blanket policy of not hiring convicted applicants. A wise businessman should at least consider implementing a policy that addresses the three factors listed above.

Timothy D. Ducar is an attorney practicing primarily in the area of construction law and business litigation. He practices in Arizona, California, Nevada and Utah. He will provide you a DVD and written materials that discuss increasing collections at no cost. He also practices in a few other areas of law. He can be reached at (480) 502-2119. 🏠