

Employment Background Checks and the Use of Arrest Records by State

The use of criminal background checks for employment purposes has become increasingly common over the past decade. According to a *CareerBuilder* survey from 2016, 72% of employers run some type of background check on every new employee. Of the employers using background checks, 82% are vetting new hires for criminal history.

Employers often expect criminal history searches to include all run-ins a subject has ever had with the law, including misdemeanor convictions, felony convictions, and arrests. Many background screening companies do not include arrest information in their background check reports.

Why are arrest records excluded from these checks, and how can employers review arrest history information if they wish to do so? This white paper answers these questions and provides state-by-state information on the proper use of arrest histories for employment decisions.

The Controversy over Arrest Records in Employment

Arrest records, like other types of criminal record information, are generally part of the public record. The most common exception involves arrest records pertaining to an ongoing law enforcement investigation. Some states require arrest records to be destroyed or wiped from the public record if the subject is not charged or found guilty or if the charges against the subject are dropped.

Arrest record details typically come up during a detailed investigation of a person's background. As such, background check companies typically find this information during their investigations. However, most background check agencies will not include details about arrest histories in their background check reports.

There is some controversy about the use of arrest history information in employment decisions. One reason for this controversy is arrest records are not significant on their own. Without a conviction, an arrest record is not proof someone is guilty of a crime. If arrest records are included in a background check report, they can lead to candidates being disqualified for job consideration for crimes for which they were never actually charged, or for offenses of which they were not found guilty.

Now you know.

The Equal Employment Opportunity Commission has issued several points of guidance to help employers navigate this complex situation.

The first point of guidance is employers who use arrest records as an outright disqualification for employment are likely discriminating against minorities or protected groups.

The second point of guidance is employers are at liberty to be suspicious of a candidate if he or she has a history of arrests. However, if those arrests are not linked to convictions, the employer must investigate the case further to determine whether the candidate or employee committed the offenses in question. Since most employers do not have the resources or know-how to conduct such an investigation, background check companies are protecting them from potential discrimination claims or lawsuits by not disclosing arrest records.

Arrest Records and State Laws: What Employers Can and Cannot Do by Location

The guidance provided by the EEOC on arrest records and their use in employment situations is just that: guidance. While employers would be wise to follow this guidance to avoid discriminatory hiring policies, the EEOC does not make the laws. There is no federal law that prohibits businesses from considering arrest records for employment purposes. There are many parts of the country where employers can use arrest records if 1) they wish to do so and 2) they are willing to do the research to find them.

Just because there is no federal law concerning the use of arrest records in employment situations does not mean there are no laws, period. Many states have passed legislation that limits, regulates, or outright bans the use of arrest histories for employment decisions. As such, your company's right to consider arrest records when hiring a new employee will depend on your location.

To help employers learn where they stand, we offer a comprehensive overview of the 50 states and Washington, D.C. and split them into four categories. Those categories are:

- States that ban the use of arrest records completely
- States with rules pertaining to expunged, sealed, or dismissed records
- States that allow or ban arrest inquiries in certain situations but not across the board
- States with no laws restricting the use of conviction or arrest information

Note these categories are purposefully broad. Every state's laws are slightly different, which means even two states that fall into the same category may have different regulations about how arrest records can be used for employment decisions.

States that ban the use of arrest records completely

Several states ban the use of arrest records for hiring purposes. The laws in these states do not prohibit employers from looking at arrest records. Instead, they either order employers not to inquire about arrest records at all or bar businesses from considering arrests "that did not result in a conviction."

States that fall into this category include:

- Arizona
- California
- Hawaii
- Maine
- Massachusetts
- Michigan
- Montana
- New York
- Pennsylvania
- Wisconsin

There are exceptions in some of these states. California, New York, and Wisconsin all allow employers to consider arrest records if charges are still pending against the subject. In Wisconsin, if charges are pending, the employer can only disqualify the candidate on that basis if the charges are relevant to the job at hand.

For the most part, employers in these states should avoid using arrest records in any hiring or employment-related situation.

States with rules pertaining to expunged, sealed, or dismissed records

Many states have laws that prohibit employers from inquiring about or making decisions based on records that have been expunged, sealed, or dismissed. These laws do not specifically cover arrest records. Rather, they pertain to any type of criminal history—including arrests, charges, or convictions—that have been expunged or sealed since entering the public record.

Technically these records should not be accessible to the public anymore, which means they shouldn't show up on background checks. However, databases don't always get updated as quickly or reliably as they should. Expunged or sealed records sometimes do come up on background checks or even in standard web searches. Employers in the following states cannot use these records (including records of arrests related to expunged crimes) to make an employment-related decision:

- Colorado
- Connecticut
- Delaware
- Illinois
- Indiana
- Kansas
- Mississippi
- Nebraska*
- New Hampshire**
- Ohio
- Oklahoma
- Utah
- Virginia

In these states, employers must take care not to ask, request, or demand applicants or employees disclose records that have been expunged, sealed, or dismissed. In addition, employers should be careful about following the Fair Credit Reporting Act (FCRA) to the letter.

Employers wishing to disqualify candidates for reasons related to criminal or arrest records must notify the candidates in writing and give them an opportunity to respond. That way, a candidate can inform the employer if the disqualifying charge, arrest, or conviction is something that has been expunged from his or her record.

* **Note:** Nebraska technically qualifies as a state with an arrest record rule that pertains to expungement, but not in the same way as the states listed above. In Nebraska, certain arrests should be automatically removed from a person's record (and therefore not available to background check companies or employers) under qualifying circumstances. These circumstances are:

1. If the prosecutor in the case decided not to bring charges against the subject, the arrest should be removed from the subject's record after one year.
2. If the subject completed a diversion program (available for misdemeanor offenses to avoid criminal convictions), the arrest should be removed from his or her record after two years.
3. If the charges against the subject were dismissed by the court, the arrest record should be removed from his or her record after three years.

These expungements should happen automatically when the required criteria are met. Once these arrests have been removed from a subject's record, employers can no longer consider them for employment purposes.

** **Note:** New Hampshire's rule is distinct from the others on this list. In New Hampshire, employers can inquire about arrest histories but are prohibited from asking about expunged records. This part of the law is similar to what is enforced in other states. The part that is unique is employers must use specific wording when asking candidates about criminal or arrest history. They must ask "Have you ever been arrested for or convicted of a crime that has not been annulled by a court?" This wording makes it clear candidates are not expected to disclose records that have been expunged.

Now you know.

States that allow or ban arrest inquiries in certain situations but not across the board

Several states have laws that allow employers to inquire about arrest records or consider them as a factor for employment decisions, but only in certain situations. This category is the smallest of the four discussed in this white paper.

Below, we explain the policies these five states enforce regarding employers and arrest records.

- **Georgia:** In Georgia, employers are limited in their ability to inquire about arrest records that belong to first offenders. Employers are not allowed to consider arrest records that did not lead to a guilty verdict or conviction if the subject is a first offender. Arrests of a person who has previously been arrested or convicted of a crime are fair game for employers to consider. Georgia residents are eligible to have their first arrests discharged under the state's "First Offender's Law."
- **Maryland:** Employers in Maryland are only allowed to ask candidates about arrests or convictions that "bear a direct relationship to the job." In other words, employers cannot ask general questions of their applicants like, "Have you ever been arrested?" or "Have you ever been convicted of a crime?" They must specify which crimes they want to know about. If there is an arrest or conviction that is relevant to the job at hand, employers can ask about it and consider it in their decision-making processes. The exception is if those relevant arrests or convictions have been expunged or sealed.
- **New Jersey:** New Jersey employers can request, retrieve, and consider information about arrests with pending charges. However, they are not permitted to inquire about records that have been expunged or arrests that did not lead to a criminal conviction. Employers cannot assume a candidate with a pending arrest is guilty.
- **Washington:** In Washington, employers may inquire about arrests but must include questions about the status of the charges. The employer must ask whether the charges related to the arrest 1) are still pending, 2) have been dismissed, and 3) led to a conviction of a crime relevant to the job at hand. Employers are required to ask whether the arrest took place within the last 10 years; older arrests cannot be considered.
- **Texas:** In Texas, the restrictions for employers and arrest records relate to the salary of the job to be filled. If the job pays \$75,000 or less in annual salary, the employer is only permitted to consider arrests or convictions from the past seven years. If the job pays more than \$75,000 per year, employers can consider arrests or convictions older than seven years.

States with ban the box policies may also have limitations on the use of arrest records. We have not included ban the box policies in this document, as they do not expressly prohibit the use of conviction or arrest history information. Rather, these policies bar employers from asking about criminal history (including arrests) on job applications. They may also require employers to delay background checks until later in the hiring process. By themselves, ban the box policies do not prohibit employers from learning about or considering arrest histories for hiring purposes.

Now you know.

States with no laws restricting the use of conviction or arrest information

Many states in the country have no laws banning or restricting the use of arrest information for employers.

These states include:

- Alabama
- Alaska
- Arkansas
- Idaho
- Iowa
- Kentucky
- Louisiana
- Missouri
- New Mexico
- North Carolina
- North Dakota
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Vermont
- West Virginia
- Wyoming
- Washington, D.C.

At the time of this writing, these states do not have any laws beyond ban the box legislation that restrict employers from asking questions about arrests or considering arrest information when making employment decisions.

Disclaimers

We stand by the information provided above, but there are a few important disclosures we must give. You should consider these disclosures before making any decisions or planning any hiring policies based on the details discussed in this document.

1. Just because a state does not currently have a law barring the use of arrest records for employment decisions doesn't mean it will remain that way. Background check legislation is always changing, as proven by the rapid spread of ban the box legislation. Before making any decisions about your company's hiring process, you should double-check the laws in your state to make sure there are no new laws in effect.
2. As mentioned previously, equal employment opportunity groups such as the EEOC and human rights organizations have issued guidance about using (or not using) arrest records. For instance, the Kansas Human Rights Commission has issued guidance instructing employers it is "inadvisable" to ask about arrests that are not "substantially related" to the job at hand. Kansas is one of the states that prohibit inquiries about arrests that have been expunged. Failure to follow guidance such as this can result in potential difficulties with the groups in question, including legal action alleging discriminatory hiring policies.
3. Even if a state doesn't have a law about arrest records and employment screening, a local jurisdiction might. One example is Hartford, Connecticut, where contractors working for the city are not permitted to disqualify candidates based on arrests or criminal accusations. Another is Portland, Oregon, where employers are not permitted to consider arrests that did not lead to convictions unless the arrests have pending charges. Always reference laws and ordinances in your area before making any decisions about arrest records and hiring.

The Verdict

Ultimately, it is important to remember arrest records do not mean anything without corresponding convictions. Regardless of the laws in your state or jurisdiction, it is always safer not to consider arrest records for employment-related decisions.

At backgroundchecks.com, we do not include arrest records on our background check reports. Instead, we provide a range of highly reliable services designed to help you screen your candidates and employees responsibly and effectively. Our US OneSEARCH and US OneVERIFY services utilize more than 550 million records from all 50 states (plus Washington, D.C., Guam, and Puerto Rico). We also offer local, state, and federal criminal searches and a range of other comprehensive background check services.

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