

Fair Chance Hiring for Employers

Part Seven: Ensuring Job Candidates Have a Fair Chance to Respond to Background Checks

By Beth Avery

For most jobs, employer background checks are unnecessary. However, if your company performs background checks for some or all positions, it can adopt policies to reduce unfair barriers to hiring workers with arrest and conviction records. NELP's eight-part "Fair Chance Hiring for Employers" series of policy briefs comprehensively explores the steps employers can take toward fair chance hiring. Part Seven explains how to implement a fair process that helps ensure misleading or erroneous background check reports don't cost you qualified applicants.

After extending a candidate a conditional job offer and conducting a conviction background check, you may determine that a candidate's conviction history inhibits their ability to perform the job sought or that a law prohibits you from hiring an individual with a past conviction that appears on the candidate's background check report. Even in these cases, however, it's important that you notify the candidate in writing about your intent to rescind their offer and allow them a fair opportunity to respond. Inaccuracies in the background check report can undermine the validity of your decisions and can be caught only by consulting the applicant. Furthermore, the context gained from soliciting additional information and conducting an individualized assessment will increase your confidence in the decision and reduce the likelihood of rejecting a great employee.

A. Provide clear written notice of intent to rescind the conditional offer, including an explanation and a copy of the background check report

Even if job-related, no conviction record should be automatically disqualifying. Instead, you should inform the applicant in writing of your initial determination and reasoning and invite the applicant to supply additional information on a reasonable timeline. Written notice to the applicant is required by certain state and local fair chance hiring laws across the country. A pre-adverse action notice is also required under the Fair Credit Reporting Act for employers that receive background check reports from consumer reporting agencies.¹

As part of your written notice, include a copy of the background check report and clearly specify which conviction(s) you deem job related and why, explaining how each offense is

directly related to the anticipated job duties. Applying this structure to the process holds your team accountable to conducting a thorough analysis. It also permits the applicant to tailor their response to whatever concerns you identify. Such rigor and transparency in the decision-making process helps minimize bias.

A preliminary notice and opportunity to respond is advisable even if a law prohibits you from hiring someone with the applicant's conviction record. Background check reports can be rife with errors or inaccuracies, and you may learn that the applicant is, in fact, legally qualified.

The preliminary notice should provide the applicant with a timeline that explains by when they need to respond (if they choose to do so) and how long after submitting their response they can expect to learn whether their offer has been officially rescinded. The notice should also indicate how the individual should expect to learn this information and whom they might contact if they do not hear anything. At the end of this policy brief is a sample preliminary notice that you can fill in and provide to candidates whose offers you might rescind.

Inaccurate Records Frequently Cause Problems for Job Applicants

Background check reports are frequently inaccurate. Incomplete data and minimal quality review means that people are often denied opportunities because of erroneous reports. Background screening companies regularly generate reports with the following errors:

- Attributing someone else's record to the subject of the report;
- Including sealed or expunged records;
- Omitting information about how the case was resolved;
- Reporting a single incident or offense multiple times; and
- Misclassifying the offense reported.²

Even records maintained by the FBI are frequently inaccurate. For example, in 2012, roughly half of the FBI's records failed to include information on the final disposition of the case. Such missing information, if it includes details like dropped charges, can be beneficial to jobseekers. Approximately one-third of felony arrests do not result in conviction, and many others are reduced to misdemeanors. NELP has estimated that 1.8 million workers per year are subject to FBI background checks that include faulty or incomplete information.³

B. Invite submission of additional information, and provide sufficient time to respond

After notifying the candidate of your preliminary decision to rescind a job offer because of a recent, job-related conviction, invite the candidate to dispute the accuracy of the record, if relevant, and to submit mitigating information or evidence of rehabilitation to demonstrate why the disqualification should not apply to his or her individual circumstances.

Suggesting what kinds of information the candidate might supply to assist your individualized assessment can be helpful. However, do not *require* submission of documents or specific information. Collecting court records and other documents can require effort, time, and money that the applicant may not be able to expend. It's unfair to shift that burden

onto the individual if the applicant doesn't volunteer the documents. The laws of at least one state—California—prohibit employers from requiring applicants to submit documents or information related to their record, which may only be voluntarily provided.⁴

If you nevertheless request certain information or documents, carefully limit such requests. First, never request police reports or other unreliable sources of information. Second, do not request additional information unless and until you have determined that the conviction record in question is job-related and may be disqualifying absent mitigating information. While it may be tempting to collapse the individualized assessment into a single step by requesting information about every conviction up front, such a process unnecessarily burdens the applicant and denies them the opportunity to focus their response on addressing your specific concerns.

Employers Should Never Request Police Reports

One particularly untrustworthy source of information is the police report. Such reports often contain errors and omit important details, and the accuracy of their contents has not been tested in a court of law.⁵

The way police have communicated about their own killings of Black men in recent years demonstrates how they can omit or misstate facts.⁶ For example, in 2021, former Minneapolis police officer Derek Chauvin was convicted of murdering George Floyd. However, the Minneapolis Police bulletin issued after Floyd's death in 2020 did not mention that Chauvin held his knee on Floyd's neck for more than nine minutes. Instead, it asserted that Floyd "physically resisted officers," and that "officers were able to get the suspect into handcuffs and noted he appeared to be suffering medical distress."⁷

Legally, a police report amounts to nothing more than allegations from the perspective of the officer who wrote it. Alone, a police report is considered inadmissible and unreliable as adversarial evidence. Even if an individual is convicted of one or more offenses stemming from the incident described in the report, not everything asserted in the police report has been proven. Your screening team should not attempt to act as judge or jury and should, therefore, not request police reports from job applicants.

Applicants should always be given adequate time—at least two weeks—to respond to your notice. Again, obtaining court records or other documentation can take significant time; so can providing written explanations or gathering reference letters.

It can be helpful to provide the applicant with examples of information they may choose to supply. The following information may be helpful for an applicant to voluntarily provide:

- Evidence that they were not convicted of one or more of the offenses listed in the preliminary notice or that the attached conviction record is inaccurate;
- Facts or circumstances surrounding the offense or conduct showing that the conduct was less serious than the conviction suggests;
- The amount of time that has passed since the conduct that led to their conviction(s);
- The length and consistency of employment history or community involvement (such as volunteer activities) before and after the offense(s);

- Employment or character references from people who know them, such as letters from teachers, counselors, supervisors, clergy, and probation or parole officers;
- Evidence that they attended school, job training, or counseling;
- Evidence that they have performed the same type of work since their conviction;
- Whether they are bonded under a federal, state, or local bonding program; and
- Any other evidence of their rehabilitation efforts, such as (i) evidence showing how much time has passed since release from incarceration without subsequent conviction, (ii) evidence showing their compliance with the terms and conditions of probation or parole, or (iii) evidence showing their present fitness for the job.

C. Review additional information as part of an individualized assessment, and rescind offers only if absolutely necessary

After receiving a response from the applicant, carefully complete the individualized assessment by reviewing the additional information and explanation provided.⁸ If the candidate does not provide supplemental information, perform as individualized an assessment as possible without that information.

An applicant may very well respond by pointing out inaccuracies in the background check report. Such errors are extremely common (as explained above), and your team should be trained to be open-minded about the possibility of errors.

Applicants may also respond with mitigating information or evidence of rehabilitation to demonstrate why the disqualification should not apply to their particular circumstances. In making your individualized assessment of this information, consider at least the following factors, which are recommended by the Equal Employment Opportunity Commission:

- The facts and circumstances of the job-related offense(s);
- The number of job-related offenses for which the individual was convicted and whether they stem from a single incident or multiple incidents;
- Evidence of work history, before or after conviction;
- Rehabilitation efforts, such as education and training, including any educational, vocational, and substance abuse or behavioral health interventions completed in prison; and
- Employment or character references and any other information regarding current fitness for the particular position.

After conducting a true individualized assessment—reconsidering the job-relatedness of the applicant’s conviction(s) without allowing the stigma of a record to overwhelm rational consideration and then examining mitigating information and evidence of rehabilitation—you will likely find that many job applicants with records deserve to be hired.

Occasionally, however, you may decide it necessary to rescind the job offer previously made to an applicant because of their record. In such cases, promptly notify the candidate in

writing and explain the reasons for your decision. Applying this structure to the process holds your team accountable to conducting a thorough analysis. It also ensures greater transparency for the candidate. A written notice of this type is also required by certain state and local fair chance hiring laws.⁹ Below, you can find a sample notice revoking a job offer that you can fill in and provide to any candidate whose offer you rescind.

“I wrote a letter and explained what had happened. . . . I don’t even know if the letter was received by anyone. . . . Did they read it? Did they throw it in the garbage? I don’t know. . . . I received no explanation at all [when my job offer was rescinded].”

— *“Maurice,” a client of the Safer Foundation in Chicago.*¹⁰

Sample Notice of Preliminary Intent to Rescind Offer

How to Use: Below is an example of a notice to an applicant expressing a preliminary decision to revoke a conditional job offer because of the applicant's conviction history. If a federal, state, or local law prohibits you from hiring the applicant because of their conviction history, you should adjust this notice to explain the relevant law and to invite the applicant to point out any relevant inaccuracies in the conviction history report.

Re: Preliminary Decision to Revoke Job Offer Because of Conviction History

Dear [APPLICANT]:

After reviewing the results of your conviction history background check, **we have made a preliminary decision to revoke our previous job offer for the position of [INSERT POSITION] because of the following conviction(s):**

- [LIST JOB-RELATED CONVICTION(S) THAT LED TO PRELIMINARY DECISION TO REVOKE OFFER]

A copy of your conviction history report is attached to this letter. More information about our concerns is included in "Our Assessment of Job-Relatedness" below.

We have not considered any of the following records:

- × Non-conviction records (arrests, charges, diversion programs)
- × Sealed, expunged, dismissed, or pardoned records
- × Juvenile records
- × Infractions and other petty offenses
- × Misdemeanors
- × Felonies that occurred more than five years ago

Your Right to Respond:

You may respond to this letter before our decision to revoke the job offer becomes final.

Within two weeks, you may send us either or both of the following:

- (A) Evidence of rehabilitation or mitigating circumstances
- (B) Information challenging the accuracy of the conviction history listed above

Please send any additional information you would like us to consider to: [INSERT EMAIL ADDRESS].

Here are examples of information you may send us:

- Evidence that you were not convicted of one or more of the offenses we listed above or that the conviction record is inaccurate (such as the number of convictions listed);
- Facts or circumstances surrounding the offense or conduct, showing that the conduct was less serious than the conviction suggests;
- The amount of time that has passed since the conduct that led to your conviction(s);
- The length and consistency of employment history or community involvement (such as volunteer activities) before and after the offense(s);
- Employment or character references from people who know you, such as letters from teachers, counselors, supervisors, clergy, and probation or parole officers;
- Evidence that you attended school, job training, or counseling;

- Evidence that you have performed the same type of work since your conviction;
- Whether you are bonded under a federal, state, or local bonding program; and
- Any other evidence of your rehabilitation efforts, such as (i) evidence showing how much time has passed since release from incarceration without subsequent conviction, (ii) evidence showing your compliance with the terms and conditions of probation or parole, or (iii) evidence showing your present fitness for the job.

We will review the information you submit and conduct an individualized assessment of whether to hire you or revoke the job offer. **We will notify you in writing if we make a final decision to revoke the job offer.**

Our Assessment of Job-Relatedness:

We have assessed whether your conviction history is directly related to the duties of the job we offered you. We considered all of the following:

1. The nature and seriousness of the conduct that led to your conviction(s), which we assessed as follows: [DESCRIBE WHY CONSIDERED SERIOUS].
2. How long ago the conduct occurred that led to your conviction, which was [INSERT AMOUNT OF TIME PASSED SINCE THE OFFENSE].
3. The specific duties and responsibilities of the position of [INSERT POSITION], which are: [LIST JOB DUTIES].

We believe your conviction record lessens your ability to perform the job duties because: [INSERT EXPLANATION].

Sincerely,

[INSERT NAME AND CONTACT INFORMATION FOR RELEVANT INDIVIDUAL]

Enclosure: Copy of Conviction History Report

Sample Individualized Assessment Form

How to Use: Below is an example of a form to help guide and record the individualized assessment. Your screening staff should complete this form after reviewing information submitted by the applicant in response to the preliminary notice. Retain each completed form for your records. As explained above, the context gained from soliciting additional information through an individualized assessment will reduce the likelihood of unfairly rejecting a qualified worker.

A. Assessment Information:

Applicant name: [INSERT NAME]
Position: [INSERT POSITION OFFERED TO THE APPLICANT]
Date of conditional offer: [INSERT DATE]
Date of conviction history report: [INSERT DATE]
Date of initial job-relatedness assessment: [INSERT DATE]
Date of this assessment: [INSERT TODAY'S DATE]
Assessment performed by: [INSERT NAME AND TITLE OF SCREENING TEAM MEMBER]

B. Report Accuracy:

Was there an error in the conviction history report? Yes No
If yes, describe the error: [INSERT DESCRIPTION AND ATTACH CONVICTION HISTORY REPORT]

C. Evidence of Rehabilitation and Good Conduct:

The applicant provided the following evidence of rehabilitation (which may include, but is not limited to, documents, letters, or other information indicating that the applicant attended school, job training, counseling, or treatment or is involved with their community):
[LIST INFORMATION PROVIDED]

D. Reassessment of Job-Relatedness:

1. The specific duties and responsibilities of the job are: [LIST DUTIES]
2. The conviction(s) of concern are: [LIST CONVICTION(S) AND ATTACH CONVICTION HISTORY REPORT]
3. How long ago the conduct occurred that led to the conviction: [INSERT AMOUNT OF TIME PASSED SINCE THE OFFENSE].
4. Activities since the offense, such as work experience, job training, rehabilitation, education, community service, etc.: [LIST ACTIVITIES LEARNED FROM RESUME, JOB APPLICATION FORMS, INTERVIEW NOTES, AND EVIDENCE OF REHABILITATION]
5. Does the offense have a direct and specific negative bearing on the applicant's ability to perform the core duties or responsibilities required for the position?
 Yes No
If yes, explain: [DESCRIBE REASONING].
6. Does the position offer the opportunity for the same or a similar offense to occur?
 Yes No
If yes, explain: [DESCRIBE REASONING].

7. Is it likely that circumstances leading to the offense will recur?

Yes No

If yes, explain: [DESCRIBE REASONING].

[IF MORE THAN ONE CONVICTION OF CONCERN, REPEAT #3 TO #7 SEPARATELY FOR EACH CONVICTION]

E. Reasoning:

Based on the factors listed above, we have reached the following decision:

[CHECK ONE OPTION]

We will NOT rescind our offer of employment.

We will rescind our offer of employment because [DESCRIBE THE LINK BETWEEN THE SPECIFIC CONVICTIONS OF CONCERN AND THE RISKS INHERENT IN THE DUTIES OF THE EMPLOYMENT POSITION].

Sample Notice Revoking Conditional Offer

How to Use: Below is an example of a notice to an applicant revoking a conditional job offer because of the applicant's conviction history. You should provide this notice to a job applicant after providing the above preliminary notice, reviewing information voluntarily supplied by the applicant, conducting a careful individualized assessment, and deciding to revoke their offer.

Re: Final Decision to Revoke Job Offer Because of Conviction History

Dear [APPLICANT]:

We are following up in regard to our letter dated [INSERT DATE], which notified you of our preliminary decision to revoke the conditional job offer.

[CHECK ONE OPTION]

- We did not receive a timely response from you after sending you that letter, and our decision to revoke the job offer is now final.
- We made a final decision to revoke the job offer after considering the information you submitted, which included: [LIST INFORMATION PROVIDED BY APPLICANT]

After reviewing the information you submitted, we have determined the following:

[CHECK ONE OPTION]

- There was NOT a significant error on your conviction history report.
- The following significant error(s) appeared on your conviction history report: [DESCRIBE ERROR(S)]

We have decided to revoke our job offer because of the following conviction(s):

- [LIST CONVICTION(S) THAT LED TO DECISION TO REVOKE OFFER]

Our Individualized Assessment:

We have assessed whether your conviction history is directly related to the duties of the job we offered you. We considered all of the following:

1. The nature and seriousness of the conduct that led to the conviction(s) that concern us, which we assessed as follows: [SEPARATELY DESCRIBE WHY CONSIDERED EACH CONVICTION SERIOUS].
2. How long ago the conduct occurred that led to the conviction(s) that concern us, which was [INSERT AMOUNT OF TIME PASSED SINCE EACH OFFENSE].
3. The specific duties and responsibilities of the position of [INSERT POSITION], which are: [LIST JOB DUTIES].

We believe your conviction record lessens your ability to perform the job duties because: [INSERT SEPARATE EXPLANATION FOR EACH CONVICTION OF CONCERN].

Your Right to File a Complaint:

If you believe your rights under the [LIST STATE/LOCAL PRIVATE-SECTOR FAIR CHANCE LAW] have been violated during this job application process, you have the right to file a complaint with [LIST ENFORCEMENT AGENCY]. For more information, [PROVIDE CONTACT INFORMATION FOR AGENCY].

Sincerely,

[INSERT NAME AND CONTACT INFORMATION FOR RELEVANT INDIVIDUAL]

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Endnotes

- ¹ Mary Griffin & John McNamara, “Applying for a Job? It’s Important to Know What Goes Into Your Background Screening Reports,” Consumer Fin. Prot. Bureau Blog (Oct. 3, 2019), <https://www.consumerfinance.gov/about-us/blog/applying-job-its-important-know-what-goes-your-background-screening-reports/>.
- ² Ariel Nelson, Nat’l Consumer Law Ctr., *Broken Records Redux* (2019), <https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf>.
- ³ Madeline Neighly & Maurice Emsellem, Nat’l Emp’t Law Project, *Wanted: Accurate FBI Background Checks for Employment* (2013), <https://s27147.pcdn.co/wp-content/uploads/2015/02/Report-Wanted-Accurate-FBI-Background-Checks-Employment-1.pdf>.
- ⁴ Cal. Code Regs. tit. 2, § 11017.1(c).
- ⁵ Juliet Brodie, “Reflections on the Unjust Influence of Police Reports in the Criminal Justice System,” Mills Legal Clinic of Stanford Law School Blog (June 10, 2015), <https://law.stanford.edu/2015/06/10/clinics-2015-06-10-reflections-on-the-unjust-influence-of-police-reports-in-the-criminal-justice-system/>; Michelle Alexander, Opinion, *Why Police Lie Under Oath*, New York Times (Feb. 2, 2013), [https://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html?_r=0%20\(Feb.%202013\)](https://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html?_r=0%20(Feb.%202013)).
- ⁶ Ari Shapiro, et al., *Police Reports are Biased. What Can Journalists Do to Better Cover Policing?*, All Things Considered, National Public Radio, (May 28, 2021), <https://www.npr.org/2021/05/26/1000598495/how-police-reports-became-bulletproof>.
- ⁷ Minneapolis Police Department, “Man Dies After Medical Incident During Police Interaction,” Minneapolis Police Bulletin (May 26, 2020).
- ⁸ Certain state and local fair chance hiring laws require employers to review the information timely submitted by the applicant. See, e.g., Cal. Code Regs. tit. 2, § 11017.1.
- ⁹ Beth Avery & Han Lu, Nat’l Emp’t L. Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions* (2021), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.
- ¹⁰ Safer Foundation interview with “Maurice” (Feb. 9, 2021) (transcript on file with author). To maintain worker anonymity, this brief uses a pseudonym and omits the employer’s name. The Safer Foundation is a nonprofit social impact organization based in Chicago that focuses on human capital development for people with arrest and conviction records. Visit <https://saferfoundation.org/> to learn more.

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