




# Leeson: Virginia employers should "Keep the Box"

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As an employment lawyer who has represented Virginia businesses for 25 years, I have a different perspective from those persons who advocate that employers stop asking applicants to check a "box" if they had a prior criminal conviction. I recommend that Virginia employers "keep the box."

To understand this issue better, there are two primary legal concepts to consider. First, the federal Equal Employment Opportunity Commission (EEOC) proclaims that an employer risks a violation of Title VII of the Civil Rights Act if it fails to hire an applicant based solely on the fact that he disclosed a prior conviction (i.e., he "checked" the box). In April 2012, the EEOC published updated enforcement guidance on this topic. An employer's selection process is also one the EEOC's top six enforcement priorities.

In other words, the EEOC will initiate litigation against an employer who refuses to hire a person in a protected class (e.g., an African-American) solely because he has checked the box. Accordingly, for decades enlightened employers have included language in their applications immediately after the criminal conviction question along these lines:

If yes, please state the facts including the location, the offense, and the date of the conviction. A conviction does not mean that you will not be hired. Please provide all the facts so that we can evaluate them as to the position for which you have applied.

With this safeguard in place, the employer can then make an "individualized assessment" as to the relevance of the prior conviction(s). Of course, the employer will also be evaluating other facts as to the applicant's qualifications such as the applicant's employment history, educational background and any necessary skills.

The second legal concept is known as "negligent hiring." Depending on the facts, an employer in Virginia can be liable for failing to conduct a reasonable investigation as to an applicant it hires who then harms another person by virtue of the employment. Consider these allegations from a 2012 Virginia case. The employer hired a person to work in a hotel, and allegedly did not perform a background check or ask about the person's criminal history. The person had previously been convicted of a felony sex crime. The person thereafter raped an 18 year old hotel maid on her third day on the job. The maid sued the hotel for "negligent hire." The case settled with the hotel agreeing to pay \$675,000 to the former maid.

In sum, I believe it is reasonable and prudent for employers to ask about prior convictions as one factor as to the overall evaluation of the applicant. I know of many Virginia employers who have hired applicants who "checked the box" because of the additional information provided by the applicant (e.g., the conviction was relatively minor and/or occurred a long time ago). Employers should "keep the box."