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## The GSH

# 60-Second Memo

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### **How (and When) Do You Look Past the Arrest/Conviction Record of An Applicant or Employee?**

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You've hired a new employee who has been working for you for about a month. Suddenly one day, police officers arrive at your office and request to speak with the new employee. You, fellow employees, and customers, witness the employee being arrested and taken away to jail. What do you do? What can you do?

The arrested employee provided no evidence in his application and/or during the hiring process that he had any pending arrests or prior criminal convictions. Reasonably, one of your primary concerns is providing a safe environment for your customers and current employees. Another concern is the appearance of the business and its perception to your customers.

How does an employer weigh these kinds of concerns against the rights of an applicant or employee?

#### **Legal Considerations**

Employers' use of arrest and conviction records is primarily governed by state law. A number of states limit the use of arrest and conviction records by prospective employers. The limitations in these laws range from prohibiting the employer from asking about arrest records to restricting the employer's use of conviction data in making an employment decision. In some states, there are no restrictions at all with regard to how arrest and conviction records can be used in making employment decisions.

For instance, several states, including California and Massachusetts, place restrictions on the prospective employer's ability to ask about certain criminal records while protecting the applicant from any requirement to disclose certain arrest information. For example, the California Labor Code restricts employers from inquiring or seeking information on any applicant concerning arrests or detentions which have not resulted in a conviction. (*CA Code of Reg. § 2787.4*) However, many other states allow an employer to make inquiries regarding a pending arrest when it involves an applicant who will be employed in healthcare, public recreation, education and child care, etc.

Hawaii and Wisconsin, despite their drastic differences in weather and the huge amount of distance between them, have similar laws prohibiting employers from refusing to hire an applicant based on his or her conviction record. In both states, an applicant's conviction record may only be considered if there is a "rational" or "substantial" relationship between the conviction record and the duties and responsibilities of the position. Hawaii goes further by requiring that the inquiry into and consideration of conviction records can only happen after a conditional offer of employment has occurred (although the offer of employment can be withdrawn if a found conviction has a substantial relationship to the job being offered). (*HRS § 378.2 - § 378.3*)

The Idaho State Human Rights Commission considers any question from the employer about arrest records, without proof of business reasons for needing this information, to be "high risk" for being found problematic. Also considered "high risk" are questions regarding conviction records, which also should not be an absolute bar to employment unless the number, nature and date of the conviction make the candidate unsuitable. (*I.S. § 33-130, 39-1105, 39-5604*) Employers must be cautious and familiarize themselves with the law in the states in which they operate.

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### **Practical Tips**

Regardless of the individual state laws that apply to your business, here are some suggestions on how to approach this issue:

#### **DO:**

- Consult legal counsel before rejecting a qualified applicant or terminating an employee *because* of his or her arrest/conviction record.
- Make employment decisions based on the underlying conduct and not the conviction itself.
- Perform an independent investigation regarding the conduct underlying an arrest/conviction by asking that person questions about the circumstances leading to the conviction or pending arrest and reviewing the public record regarding the circumstances which led to the conviction.
- Make a determination about whether the conviction or pending charge had a substantial relationship to the job, and be prepared to articulate it.

#### **DON'T:**

- Ask an employee or a qualified applicant about an old arrest or charge that did not result in a conviction, unless your particular state law allows this.
- Refuse to hire a qualified applicant because of a criminal conviction that is not "rationally" or "substantially" related to the job.
- Suspend or terminate an employee just because a conviction is upsetting to the employer, co-workers or customers.
- Make a decision regarding a qualified applicant or employee's arrest/conviction record without first seeking legal advice.

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