

ARREST AND CONVICTION RECORD DISCRIMINATION

I had done a program on this issue for SHRM several years ago but the issue keeps popping up for me in my practice as to employers who hire out for criminal background checks and the frequent inaccuracy of those background checks. A lot of these third party entities that are offering criminal background services are not interpreting conviction documents correctly. I warn you to be on the look out for mischaracterizing “FO” in a case number as a felony, when in fact this only constitutes a civil forfeiture, for example, a speeding citation.

Another example of misinterpretation is when records reflect that a plea is entered into pursuant to a diversion agreement, often labeled as “conviction withheld due to State motion” on CCAP. These entities are interpreting these matters as criminal convictions when they are not. A Diversion Agreement is an agreement that a criminal defendant enters into with the District Attorney’s office to avoid criminal prosecution. These agreements are only offered to first time offenders when the gravity of the offense warrants a second chance. These agreements require that the criminal defendant not be caught participating in any other crime, usually require some counseling, community service and other conditions that fit the crime charged. While a criminal defendant is charged with the crime and may plead guilty to it pursuant to that Diversion Agreement, no conviction is entered unless the Agreement is violated while the Agreement is legally in place. Typically these agreements last 12 months, some may be longer. Most criminal defendants who enter into these agreements successfully complete the program and gain the opportunity to never have a criminal conviction. However, the misreading of CCAP records and/or the wrong interpretation by third party entities who are conducting criminal record reviews inaccurately, can lead to potential liability for an employer who chooses to make an ill reasoned employment decision ultimately then on an arrest and not on a conviction. Remember, there is no conviction in this situation unless an individual violates this Agreement.

Needless to say, if you are going to review criminal record information, then you need to be very aware of your obligation to be accurate in the use of that information, along with your legal obligations not to discriminate against those in violation of the Wisconsin Fair Employment Act. In practicality these mistakes continue to occur, so never completely rely on your outsourced entity. I wanted to reemphasize this point as this issue has not gone away.