



Current Trends in Credentialing Organizations' Use of Criminal Background Checks

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With all the recent attention to criminal history data in the context of data privacy and employment decisions, there is a growing interest in how credentialing organizations use criminal history data to evaluate candidates for certification. The evaluation of criminal history data raises issues of credentialing standards, liability considerations, state and local regulation, and philosophical approaches to certification eligibility. To better evaluate how the credentialing community assesses this issue, GKG Law reviewed the applications (and where available, candidate handbooks) for 50 credentialing and certification bodies in the United States. This was an internal survey to evaluate current practices and trends, and, while useful, the data we cite should not be considered a scientific predictor.

In addition, we reviewed some of the recent legislative and regulatory trends surrounding the use of criminal history data. While we broadly examined "Fair Chance Act" and "Ban-the-Box" reforms being enacted in jurisdictions across the U.S., organizations should make sure to check the relevant state and local rules applicable to the jurisdictions in which they operate.

Our Findings

Out of the 50 organizations we reviewed:

- Only 36% had an explicit criminal history component to the certification process.
- 14% required an active, unrestricted license or some proof of a license in good standing, which indirectly implicates criminal history issues at the state licensing level.
- 50% did not address criminal history or having a state license in good standing.
- In health services or therapy related fields, 66% of credentialing organizations included a criminal history component in the certification process or required an active unrestricted license to practice (46% addressed criminal history and 20% addressed an active license).
- Where the certification was for state-licensed health practitioners such as doctors, psychologists, or nurses, virtually every organization we reviewed asked about an active unrestricted license rather than criminal history.
- 87% of non-health services or therapy related certifications included no criminal history questions.
- Where a criminal history check was present, 22% had a strict policy on disqualifying offenses related to the field, 6% had a broad policy of disqualification for prior offenses, and 72% had an open-ended question for case-by-case evaluation (*e.g.*, "Have you ever been convicted of a crime? If so, please explain").

As we expected, criminal history was most often addressed in the context of health or therapy related fields. The only non-health fields that required a check in our survey also involved working with vulnerable persons or loved ones. This makes sense because these fields often involve interactions with vulnerable people (*e.g.*, children, the elderly, the ill, or others, depending on the nature of the underlying activity),

and in many cases, consumers are depending on these professionals to help them address sensitive issues related to their health and wellness.

With a few exceptions, however, criminal history policies all appeared to be tailored to address issues directly related to the field or involve a case-by-case basis evaluation. This also makes sense because many of these health and therapy related fields necessarily involve rehabilitative philosophies (*e.g.*, addiction counseling).

Legislative and Regulatory Trends

In recent years, “Fair Chance Act” reform and “Ban-the-Box” legislation have targeted the use of criminal history questions in job applications. These reforms seek to move any considerations of criminal history from the initial application stage to later in the interview process, so as to mitigate discriminatory harm to ex-convicts by employers that simply reject all initial applications reporting a criminal history.

These reforms began by targeting public sector employers, and then, over the years, expanded to include the private sector. There is a growing trend to expand these policies to include public sector licensing authorities (*i.e.*, “Fair Chance Licensing Reform”). In the past two years, 10 states have enacted some type of Fair Chance Licensing Reform laws or regulations. At present, 15 jurisdictions have incorporated some form of Fair Chance Licensing Reform: Arizona, Illinois, Georgia, Kentucky, Louisiana, Delaware, Indiana, Massachusetts, Tennessee, Maryland, Missouri, Colorado, Connecticut, Minnesota, New Mexico, and New York City.

Like their employment-focused counterparts, these licensing reforms still allow state licensing authorities to disqualify candidates that have recent and/or serious criminal histories directly related to the occupational field. The goal of the reforms (so far) is to tailor the consideration of criminal history to relevant offenses and move the consideration to later in the process, rather than dispense with criminal history review altogether.

Just as the Fair Chance Act Reforms moved from public to private sector employment, however, it is possible that the recent focus on public sector licensing authorities may expand to include private sector credentialing bodies. We did not identify any enacted laws or regulations to that effect, but it is something to keep in mind as the Fair Chance Reform movement continues to evolve. It is also unclear how such reforms would apply to credentialing processes, which often do not include a second stage of interviews after the initial application.

Risk Assessment Considerations

Credentialing bodies need to balance the liability concerns regarding harm to applicants and harm to consumers that rely on the credentials. Where the credential involves interactions with vulnerable people or issues such as physical or mental well-being, consumer reliance on the credentials presents a greater risk to credentialing bodies. Conversely, applicants may feel discriminated against if they are disqualified for convictions that occurred long ago or bear no relation to the occupational field. Risk assessments will

have to be compared to organizational philosophical approaches. Does your organization's mission and purpose support taking the risk of allowing applicants with criminal histories to apply for its credentials?

Given the "flux" and continued evolution of how and when organizations evaluate criminal histories, this is a good time for organizations to consider their approach and, perhaps, tailor their policies appropriately.