

# Ten Critical Steps for Ex-Offenders to Get Back into the Workforce

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Employers have become increasingly concerned about knowing if an applicant has a criminal history for multiple reasons. As a result, more employers are conducting pre-employment background checks to try to minimize the risk of a bad hire. One reason for their concern is that employers have been the subject of large jury verdicts for negligent hiring—a situation where a person with a criminal record is hired and then harms others—that could have been avoided by a criminal record check. Employers feel they are susceptible to these actions because they have a legal duty to exercise due diligence in the hiring process, and that duty can be violated if an employer hires someone that they either knew or should have known in the exercise of reasonable care was dangerous or unfit for a job. The concern from the employer's point of view is that a person with a criminal past may have a propensity to re-offend in the future.

On the other hand, society also has a vested interest in helping people with a past criminal record obtain and maintain employment. It is difficult for an ex-offender to become a law abiding, tax-paying citizen without a job. Unless society wants to continue to spend its tax dollars on building more and more jails and prisons, ex-offenders need the opportunity to rejoin the workforce. Getting ex-offenders back into the workforce is a win-win for everyone.

For an ex-offender, a job search can become a frustrating “Catch-22” situation. Unless prohibited by law, many employment applications may ask in some fashion if a person has a criminal record. If not on the application form, a job applicant may well be asked at or after an interview about a criminal record. If a person lies, then they are always at risk of being terminated if the criminal record is discovered later. If a person is honest and admits the past misconduct, there is a substantial risk of not even getting a chance to compete for the job. The fear is that upon learning about a past criminal conviction, the employer will simply trash can the employment application or stop considering the applicant at all.

The bottom line is that many ex-offenders seeking to rebuild their lives and get back into the mainstream face significant challenges. An ex-offender seeking a second chance may run into a wall where an employer will not even consider their application in the first place. That can occur when an employer has pre-judged the applicant based upon their status as an ex-offender without even knowing anything about the ability of the applicant to successfully do the job. Ex-offenders may well feel there is a prejudice against them since the root of the word prejudice is “Pre-judgment.” In other words, an ex-offender faces the prospect of being judged by their status as an ex-offender instead of an individual who may in fact be a great candidate for the job.

There is no perfect answer. A person with a criminal record is going to face greater challenges in getting employment. That is a fact of modern life. In addition, there are certain jobs where an employer will justifiably not hire an ex-offender. In fact, there are positions where, by law, an employer may be prohibited from hiring an ex-offender. This can occur for example if there is a government mandates licensing rule where the law specifies that certain offenses make a person ineligible.

**However, challenging is not the same as impossible.** The key is the right attitude and getting and keeping that first job, so that as time goes by, a person has developed a successful job history that

outweighs past problems. The goal of this paper is to provide helpful insights and suggestions to help ex-offenders get back into the workforce.

### **Ten Approaches for Ex-Offenders**

Here are ten (10) approaches a person with a past criminal record can consider when seeking employment:

1. See an attorney to explore if you are eligible to get your conviction sealed, expunged, or judicially set aside.
2. You may have the Legal Right to say NO on an application or interview if asked about a criminal record.
3. Does “Ban the Box” apply to you?
4. Understand your rights under the Fair Credit Reporting Act (FCRA) and state laws if there is a background check and your criminal record is being used against you.
5. If a background report is not 100% correct and accurate, immediately contact the background screening firm and the employer.
6. Request an Individualized Assessment of your situation.
7. Seek professional assistance and talk to people experiencing the same challenges.
8. Honesty is the best policy.
9. Start to rebuild your résumé one step at a time, even if it is not the "perfect" job.
10. Take the long-term view.

#### **1. See an attorney to explore if you are eligible to get your conviction sealed, expunged, or judicially set aside.**

This is the critical first step. Ask an attorney if the criminal record can be expunged or set aside by going back to court, or whether it is even the type of offense that an employer may legally ask about or consider. Each state has different rules, but in all states, there is a mechanism for going back to court to try to seal or expunge certain offenses. This is an area of law where there are constantly new developments. In Ohio for example, there is a procedure to apply for a “Certification of Qualification for Employment” which can assist an ex-offender in getting a job and also gives the employer some legal protection against an allegation of negligence.

The main point? **Make sure you have explored your options.** The attorney who represented you, the local Public Defender, Probation Office, Legal Aid or groups dedicated to helping ex-offenders should be able to assist.

The best bet is to make sure you understand the impact a criminal conviction may have on your employment chances at the time the case is in court. This is sometimes referred to as the “collateral consequences” of a guilty plea or a finding of guilt. Court cases can be complicated and going through the court system can be very stressful. As a result, some people do not always understand how a criminal conviction may impact their chances of employment or what rights they may have later on to try to go back to court and try to obtain legal protection when job hunting. You can never ask your attorney too many questions about this important topic.

Here is an important tip. If you do go back to court and get your matter set aside so it no longer can be used against you, take steps to try to correct public records and criminal databases to update your status

so you can avoid dealing with an incorrect report. This is not only essential, but it is doable. It is important to keep in mind that there are two different types of background check firms. Many background check firms do NOT rely upon databases as a primary source of information, but they create each report only upon an employer's request by checking the local public record. Ideally, the background firm should see the current status of the public record.

However, there are some firms that use so-called "national" criminal databases. These databases are NOT official government records, but a hodge-podge of data that is assembled for sale and is not necessarily updated or corrected. A non-profit organization called the Privacy Rights Clearing House ([www.Privacyrights.org](http://www.Privacyrights.org)) is developing a resource to help ex-offenders and their attorneys to identify these private criminal database providers in order to correct the information at the source. Mass mailing to every screening firm you can find is not very helpful since most firms do not keep or create permanent records. It is important however to contact firms that create and maintain databases. In fact, an enforcement action in October of 2015 by a federal government agency called the Consumer Financial Protection Bureau (CFPB) against a firm that maintained incorrect criminal data may potentially motivate firms that create such dates to take many more steps to ensure accuracy.

## **2. You may have the Legal Right to say NO on an application or interview if asked about a criminal record.**

Assuming a criminal record cannot be set aside judicially, then the next step is to understand your rights. There are instances where an applicant can legally and ethically answer NO on a question about a past offense. For example, in many states there is no obligation to report arrests not resulting in a conviction or that are not currently pending in court. Some states have pre-trial diversion, delayed entry of judgment, or some other type of program where a person may be able to avoid a criminal conviction by successfully completing some sort of court mandated program. In some counties, a person may be eligible to participate in a drug court program and, if successful, avoid having a criminal record. These types of programs can result in a case that a background firm cannot report and an employer cannot consider. There are some states such as New York and New Jersey where lesser offenses are defined by law as being non-criminal (although there may not be any prohibition against a background check firm reporting the matter). There may be restrictions on minor offenses.

If any of these situations apply to you, then you may have the right to answer NO when asked about a criminal record. However, it is important to keep in mind that for state court convictions, every state has its own laws and rules. In order to avoid any misunderstanding or making a mistake, it can be helpful to consult a criminal attorney with experience in the county where the offense occurred to determine if you can legally say NO about any past offenses. Of course, as mentioned next, in many states, an applicant cannot even be asked about a past offense until at or after an interview.

## **3. Does "Ban the Box" apply to you?**

A new national movement called "Ban the Box" seeks to prohibit public and private employers that are covered by the laws from asking about criminal records at the beginning of the employment process. More than 100 cities, counties, and states have in some fashion made it easier for ex-offenders to apply for a job in the first place by not forcing them to reveal upfront a past criminal matter before they even have the chance to demonstrate their merits and qualifications. A number of private employers, including some large national employers, have voluntarily adopted a "Ban the Box" approach and the federal Equal Employment Opportunity commission (EEOC), the federal agency that enforces anti-discrimination laws, recommended that employers utilize that approach in its 2012 Guidance on the use of criminal records.

The idea is that if a person is forced to reveal a criminal record too soon in the employment process, then they may be subject to an “early knock-out punch,” regardless of their qualifications. Ex-offenders may believe that revealing their past conviction on an employment application can mean potential employers will stick it in the trash can without even giving them a chance. As a result, an ex-offender could be “chilled” or “deterred” from even trying to apply in the first place. Given the value of getting everyone a job, the “Ban the Box” movement aims to pass laws to let everyone start the process on an even playing field regardless of a past criminal history. The “Box” referred to in the name “Ban the Box” is the “yes” or “no” box often contained in an employment application that follows a question about past criminal conduct.

According to the National Employment Law Project (NELP), more than 100 million Americans – roughly one-third of the U.S. population – live in a jurisdiction with a Ban the Box hiring policy. In addition, there are an increasing number of private employers who are adopting Ban the Box even if not legally required. If you are in a “Ban the Box” jurisdiction, then you may not be required to reveal a criminal record until at or after an interview. Ban the Box gives an ex-offender a fair chance to compete for a job based upon their Knowledge, Skills, and Abilities (KSA). However, not all Ban the Box laws cover private employers. Some laws only cover public employees. A regularly updated list of Ban the Box jurisdictions can be found at [www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/](http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/).

Keep in mind that Ban the Box does not mean that a criminal record check will not be performed. An employer still has the right to conduct an appropriate criminal record check at or after the job interview. But by waiting to ask about criminal matters until later in the process, an ex-offender has an opportunity to demonstrate they are more than just the label of “ex-offender:” and can try to show an employer that they can be a contributing and valuable member of the team.

#### **4. You have certain procedural rights under the Fair Credit Reporting Act if there is a background check and your criminal record is being used against you.**

If you are under final consideration for a job, an employer may then proceed to perform a background check. There is an important federal law called the Fair Credit Reporting Act (FCRA) that controls how background checks are done. That law includes a number of procedures that must be followed to ensure a job applicant consents to the background checks and is given certain disclosures about the process. It requires a background screening firm to use reasonable procedures to obtain maximum possible accuracy and there are special accuracy rules when it comes to criminal records. Some states have their own rules as well. The important point for a job applicant is that there cannot be any “secret” background checks. You must specifically consent to it, and certain disclosures must be made to you.

Here is the good news: Employers do not spend time and money ordering a background check unless they are seriously interested in hiring you. The background check comes at the very end of the hiring process and is only used for a person that is potentially a finalist. Employers simply do not spend time or money to check all applicants, but just ones that have made it through the selection process to the point where the employer is seriously considering offering a job. An employer’s goal is to make sure they are hiring the right person for the right job.

One critical rule under the FCRA is your right to be notified if the background report is being used against you. The FCRA mandates certain protections for consumers to provide a safeguard against errors or mistakes. If something adverse or negative is reported in your background check and it impacts your chances, no matter how slightly, you also have a right to know about that before a final decision is made, and to have the background firm re-investigate anything you feel is incorrect or incomplete. Under the adverse action rules, the employer MUST send you a “pre-adverse” action letter that includes a copy of the background report, as well as a document prepared by the government called “A Summary of Your Rights Under the Fair Credit Reporting Act” (Un resumen de sus derechos en virtud de la Ley de Informe

Justo de Crédito) so you have a meaningful opportunity to review, reflect, and react to the report. Generally speaking, employers will wait 5 to 10 business days for you to respond. The employer then needs to send a second “adverse action” letter to you (which may include another copy of the report and another copy of your rights) informing you if the decision is final.

If you get such a letter, and you feel that there is anything incomplete or inaccurate about your background check, then you need to follow step five.

**5. If a background report is NOT 100% correct and accurate, immediately contact the background screening firm and the employer.**

A background screening firm has an absolute legal duty to investigate any and all objections a consumer has to a background report, and generally must do it within 30 days. The law is very detailed about consumer’s rights under the FCRA. In fact, the federal government has even prepared a document called “A Summary of Your Rights Under the Fair Credit Reporting Act” that must be provided to an applicant if an employer intends to use any part of a background check in any way that is adverse to the consumer. See: [www.esrcheck.com/file/CFPB-Summary-of-Rights-Under-FCRA-2015.pdf](http://www.esrcheck.com/file/CFPB-Summary-of-Rights-Under-FCRA-2015.pdf).

It is absolutely critical for consumers to contact the screening firm as soon as possible if they find anything they either do not understand or feel is not 100% accurate or portrayed fairly. They should not feel discouraged or defeated if something comes up that is not correct. If they do not speak up, the matter cannot ever be corrected. In fact, a professional screening firm that understands the law and their legal obligations wants to hear from you. Professional background firms are just as anxious as consumers are to ensure that all information is correct and accurate. The vast majority of screening firms take that responsibility very seriously.

**6. Insist upon an Individualized Assessment of your situation.** A big boost for ex-offenders seeking a second chance came on April 25, 2012 when the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcement of the federal Civil rights Act, produced a new and updated ‘Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.’ The EEOC also suggested, although indicated it was not required, that employers consider the use of an “**Individualized Assessment**” in cases where an applicant is rejected due a criminal record. An “Individualized Assessment” basically means that an employer should inform you that you were excluded due to past criminal conduct and the employer provides you an opportunity to make your case to the employer that either the criminal matter is incomplete or incorrect OR even if you do have a criminal conviction, that they are reasons you should still be hired. The EEOC Guidance described the process as follows: Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual’s additional information shows that the policy as applied is not job related and consistent with business necessity. The individual’s showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example;

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;

- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

Source: [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

An important consideration is that once the employer notifies you of your opportunity, it is your responsibility to follow up with the employer. The employer does not need to pursue you to set up a meeting. In other words, the ball is in the applicant's court once the employer sends out the notice.

The important walkaway point: Be proactive and make your case if you are in the situation where you made it to the interview and then you are eliminated due to a criminal record.

### **7. Seek professional assistance and talk to people experiencing the same challenges.**

In addition, some people have found it very helpful to network and obtain support from others experiencing the same challenges. Veteran groups, second chance organizations, faith-based organizations, or community groups may be great places to hear about experiences of others and find out approaches that worked better than others. You may also learn about employers that are more open to providing a second chance to people who are motivated to work hard. Ex-offenders may discover not only are they not alone but there is light at the end of the tunnel.

There are also organizations that assist past offenders. Some of these organizations have relationships with employers who are willing to give an ex-offender a chance. In addition, these organizations can help a person prepare a resume and practice interview techniques that deals honestly with the past offense but helps a job applicant put their best foot forward by explaining why they can perform the job and why the employer should hire them. Various re-entry or training programs will help ex-offenders develop new skills or teach job search techniques.

### **8. Honesty is the best policy.**

In applying for a job, honesty is always the best policy. A criminal matter honestly explained during an interview may have much less negative impact than hiding it and having an employer discover it later. If an employer discovers an applicant was dishonest, the denial of a job could be based upon a lack of honesty, regardless of the nature of the offense. However, a person who has made a mistake and is now motivated to do well at a job may be of great interest to some employers. Sometime a person may answer a question wrong because they are honestly mistaken about what charges they plead to, or what their rights were. This goes back to the earlier point that it is critical to make sure you understand the essential details of a criminal case.

### **9. Start to rebuild your résumé one step at a time, even if it is not the "perfect" job.**

All employers know that the best indicator of future job performance is past job performance. If a person with a criminal record can obtain whatever job they can, hold that job and do well, the next job become much easier. It is the building block approach—one block at a time.

It is critical to seek to rebuild your resume by finding any employment you can to rebuild your resume. You should first seek employment with people you know. Ask everyone that likes you if they know someone who might be willing to hire you. Yes, mention your conviction, but stress your strengths and

how much you learned from your past. Someone who knows you personally is more likely than a stranger to give you a chance.

If that does not work, then consider starting at the bottom. A few months of good work in an entry-level position can yield a good reference, which can start your career back upward. Be the best worker you can be by showing a positive, can-do attitude, getting to work on time, work on time (or even early), and making yourself indispensable.

According to career coach Marty Nemko, an entry level-job can be a launch pad and a foot in the door. Do a great job, build relationships with higher ups, and express interest in moving up, and before long, you may find yourself promoted. And if you take an entry-level job in order to rebuild your résumé, be sure it's one in which people with the power to promote you can observe the quality of your work. Avoid taking a job off-site or in a remote location. If you enjoy working for the organization, ask questions and let them know you are interested in moving up.

There are certain industries that are in real need of workers. A fast-food job, for example, may not be the job you want, but it is an example of a job that is widely available and allows a person to rebuild their credentials and show what they can do.

Eventually, what a new employer sees is a person with great recommendations and an excellent job history. As the criminal conviction gets older, and the job history becomes stronger, a person who has made a mistake in the past will eventually find that the criminal record is less of an issue. It cannot be stressed enough that the best way to get a great job in the future is to get any job you can right now and perform well.

One piece of good news for ex-offenders has to do with the aging of the workforce. There is a prediction that as the "baby boomers" retire that there will be a labor shortage in the United States. If that occurs, many employers may be more concerned with finding people with positive "can-do" attitudes and may give less importance to what a person did in the past.

#### **10. Take the long-term view.**

This is the most difficult and most important advice to follow. An ex-offender is anxious to get back into the workforce to start making a living. They may also be anxious to have their old life back. Yet the deck may well be stacked against a person with a criminal record. The jobs that are available may not be the ones that you want. You may be qualified for something a great deal better. Doors may slam in your face, and you may very well be subject to unfair assumptions. The frustration level could easily build with each disappointment encountered.

What it comes down to is that an ex-offender needs to take the long view and have the faith and patience that the criminal matter will eventually be put behind them. As frustrating as it is, the basic rule still applies—a person must rebuild their résumé over time. And as time goes by, the criminal offense becomes less of a factor in a person's life. But it is going to take time.

Look at it this way. Even if it takes five years to rebuild your resume and get the job you want, five years will still go by. Five years later, what would you rather have—a new life with a good job or still be living in frustration because you couldn't get what you wanted right away?

#### **Three Case Studies**

##### **Case Study 1:**

A schoolteacher was convicted of a misdemeanor offense that disqualified her from teaching. The person had dedicated her life to teaching, and suddenly it was no longer an option. She was very depressed and

upset that she could no longer do what she loved and knew how to do so well. In order to qualify for a work-furlough program, she obtained a job with a friend in a retail store. It turned out that she had a talent for the new job and became very successful and happy with it and found a new and satisfying career.

### **Case Study 2:**

A medical professional committed an offense that disqualified him from practicing his profession. He could not imagine being employed in medicine. That had been the most important aspect of his life and defined who he was. It took a longer period of adjustment, and he was very depressed and unhappy. He spent a great deal of time being upset about how unfair it was that he could not do what he could best. Out of necessity, he found a job in construction. It turned out that he had a talent for this temporary job. He loved the hours and the freedom it gave him. He also realized that the pressures he had put himself under were the root cause of the criminal conduct. A few years later when he would have been eligible to attempt to regain his license, he had decided he enjoyed his new life, and did not want to go back.

### **Case Study 3:**

A young woman got involved in the wrong crowd at an early age. She was convicted of drug offenses and spent time in prison. In prison she obtained her GED. Upon release, she got a job in a fast-food place. It was not the best job, but she worked hard and made herself the best worker in the place. She was always on time, cared about her job, respected her co-workers and supervisors, and showed a real interest in succeeding. Since employers need that kind of worker, she was eventually promoted to the management trainee program. She then turned for assistance to a program that helped women get jobs and was able to find a well-paying administrative job in a growing firm. It took time, but she did everything right.

These case studies have one critical element in common. These individuals could not have been more depressed and frustrated at their situation. But by being patient, taking the long view, and believing things could get better, eventually their lives went in new and better directions.

### **Conclusion**

As already noted, there are numerous challenges facing an ex-offender in obtaining employment. However, challenging is not the same as impossible. It can be done, and a large number of people have done it. Hopefully these tips will be helpful for individuals trying to overcome obstacles and getting back into the workforce.

One last tip that has helped some people: Do not be the last person to know what a background check report will say about you. If you are in a position to do it, you can order your own background check report from some companies. However, keep in mind that just because a background check firm cannot legally report something, does not mean that an applicant should necessarily risk hiding something that can legally be asked.

*\* NOTE: This whitepaper is not intended, given, or offered as legal advice but for educational purposes only. This whitepaper is provided as a public service for job seekers who must overcome the burden of a past criminal matter to obtain a job. The author, who is the founder of an employment screening company, is unable to give job seekers individual advice on job seeking or on any legal matter. If you have a question about your situation, you are advised to contact a knowledgeable professional. Your local bar association can give you the names of attorneys who may help and may have a low-cost introductory visit program available. Check online for local attorneys or local bar association or lawyer referral program. Your local public defender's office may be able to help. Job placement professionals, second chance organizations, churches, or re-entry groups can also be of assistance. Many local governments*

*and states also offer re-entry and job training programs. The bottom line is that if you look hard enough, there is every reason to believe that you will find someone who will help you get a second chance.*

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