

When (and How) to Consider the Criminal History of Employees and Job Applicants

April 21, 2022

André Lindsay, Associate General Counsel
Sarah Edwards, Senior Associate General Counsel



Agenda

- Incarceration Rates
- Disparate Impact Theory
- Legal Protections
- EEOC Guidance
- UNC System Regulation
- University Policy 101.23
- Questions

Poll Questions 1 & 2

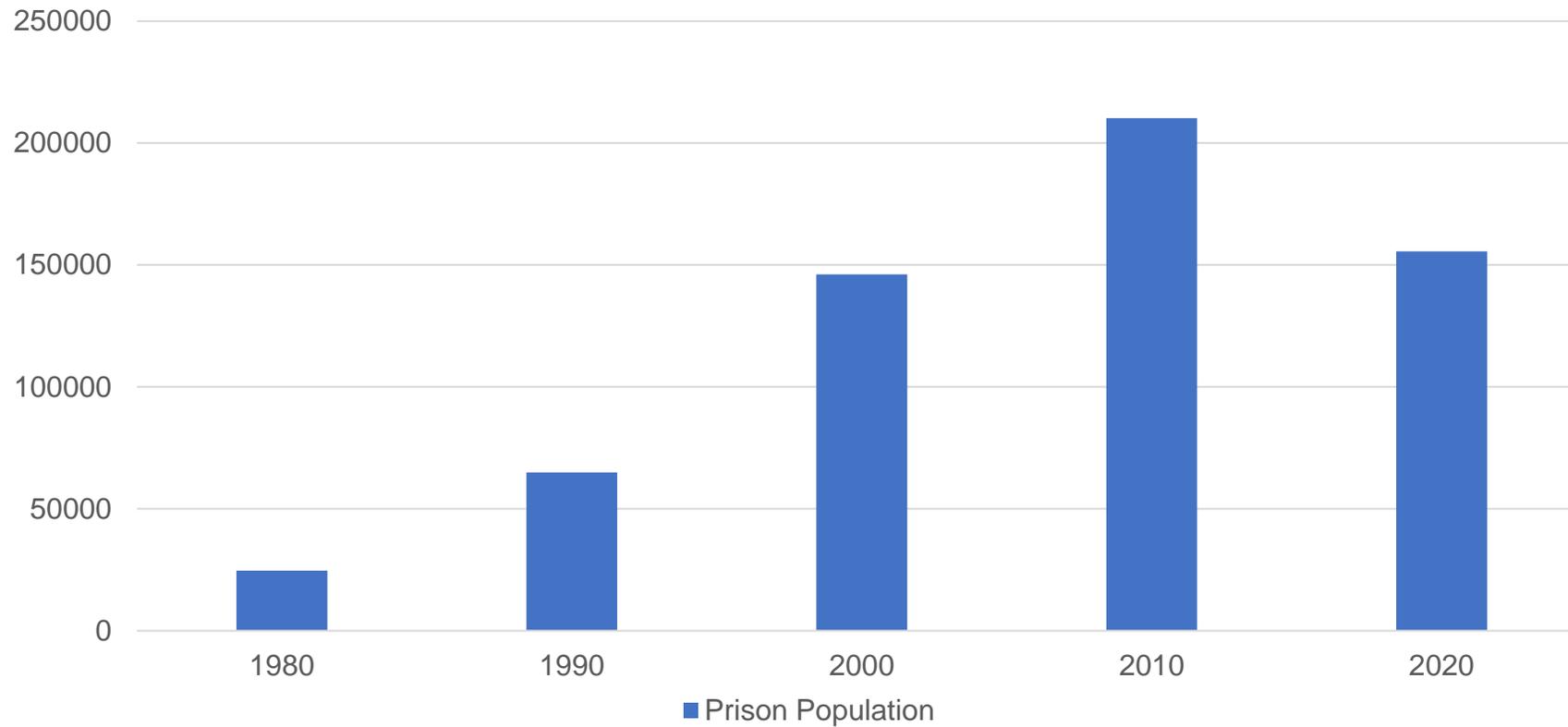


Incarceration Rates

- Nearly 1 in 3 adults in the United States have had contact with the criminal justice system resulting in a criminal record (appx. 65 million Americans).
- African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population.
- Federal Bureau of Prisons data (as of April 2022):

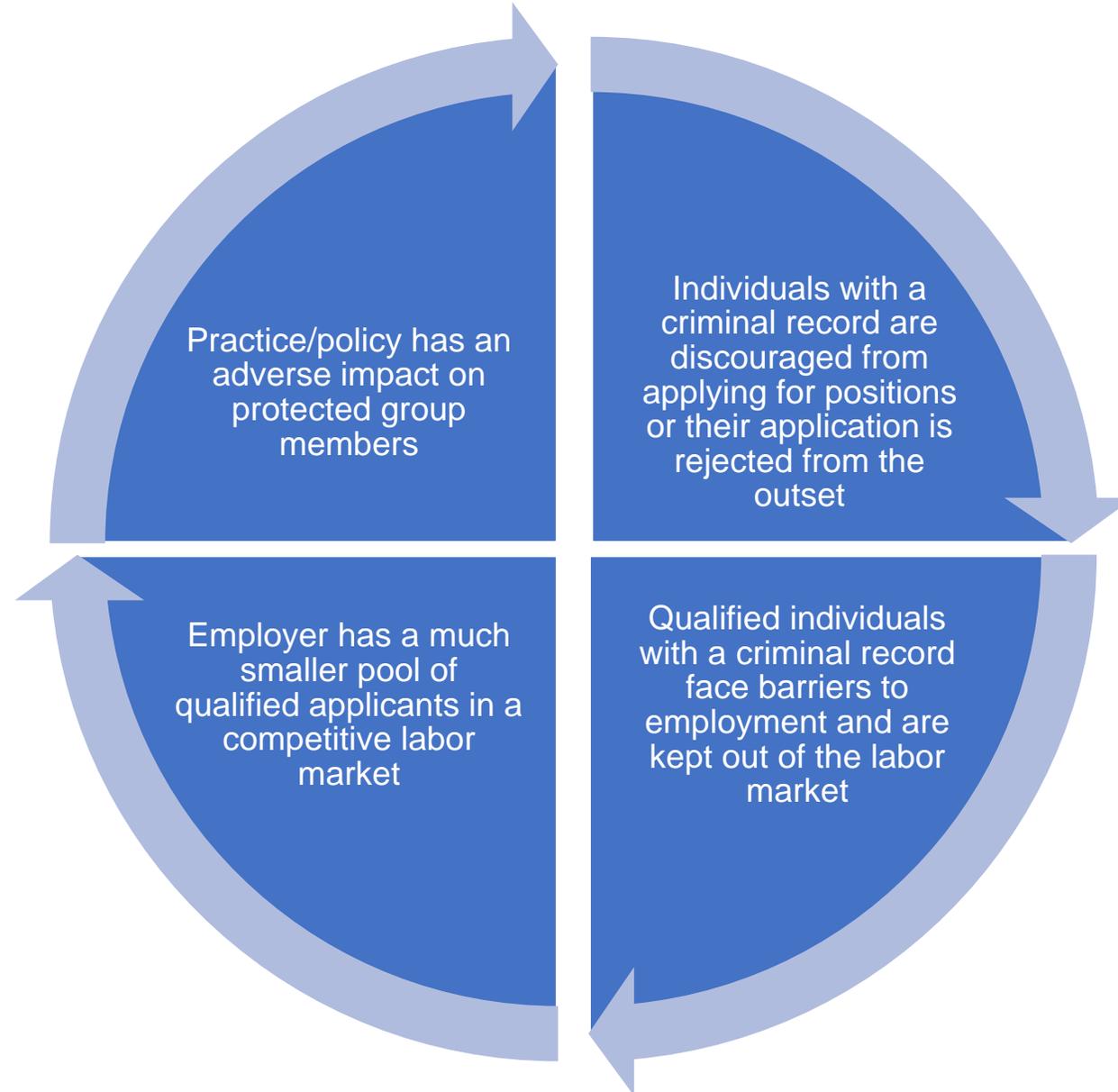
Race/ Ethnicity	%
African American	38%
Hispanic	30%
White	57%

US Federal Prison Population 1980-2020





Impact of Criminal Record Checks





Disparate Impact Theory

- Disparate impact refers to discrimination that is unintentional.
- Disparate impact is a way to prove employment discrimination based on the effect of an employment policy or practice rather than the intent behind it.
- Laws that prohibit employment discrimination apply not only to intentional discrimination, but also to apparently neutral policies and practices that have a disproportionate adverse affect on members of a protected class.



Disparate Impact Theory

- Disparate impact discrimination is not always illegal. If an employer has a legitimate, necessary, and job-related reason for applying its procedures, then it is allowed to do so.
- If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a plaintiff may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively but that the employer refused to adopt.



Griggs v. Duke Power Co.

- A group of minority employees at Duke Power Company brought a class action against their employer alleging that the employer violated the Civil Rights Act of 1964 by requiring a high school diploma and a satisfactory intelligence test score for certain jobs previously limited to white employees, so as to preserve the effects of the employer's past racial discrimination.
- The Supreme Court explained in *Griggs* that under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."
- As the Supreme Court has explained, even benignly-motivated policies that appear neutral on their face may be traceable to the nation's long history of invidious race discrimination in employment, education, housing, and many other areas. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971)

Poll Question 3



UNIVERSITY OF NORTH CAROLINA
CHARLOTTE

Legal Protections





North Carolina Second Chance Act

- On June 25, 2020, Governor Roy Cooper signed the Second Chance Act.
- The Act provides that criminal charges which result in a not guilty verdict or dismissal without leave by the court will automatically get expunged by operation of law.
- The portion of the Second Chance Act granting automatic expungements for charges resulting in Not Guilty Verdict or Dismissal Without Leave dispositions, becomes effective only for cases disposed on or after December 1, 2021.
- For prior criminal charges to be expunged, the current expungement Petition and Hearing process in the Criminal Procedure Act must still be followed to have these charges removed from a person's record.



North Carolina General Statute § 15A-153

- According to North Carolina General Statute § 15A-153, the purpose of the expungement process is to:
 - “clear the public record of any entry of any arrest, criminal charge, or criminal conviction that has been expunged so that
 - (i) the person who is entitled to and obtains the expunction may omit reference to the charges or convictions to potential employers and others and
 - (ii) a records check for prior arrests and convictions will not disclose the expunged records.”



How does this apply?

- “An employer or educational institution shall not, in any application, interview, or otherwise, require an applicant for employment or admission to disclose information concerning any arrest, criminal charge, or criminal conviction of the applicant that has been expunged and shall not knowingly and willingly inquire about any arrest, charge, or conviction that they know to have been expunged. .”
- This subsection does not apply to State or local law enforcement agencies authorized to obtain confidential information for employment purposes.



Certificate of Relief

- NC State law allows individuals who have been convicted of certain crimes to petition a state court for a Certificate of Relief that relieves some “collateral consequences” of a conviction (N.C. Gen. Stat. § 15A-173.2).
- An individual granted a certificate must notify his or her employer if the certificate is revoked or modified.
- Reliance on a certificate of relief is a bar to a negligent hiring claim brought against the employer.
- Document carefully the employment decision made (e.g., hiring) in reliance on the certificate.



UNIVERSITY OF NORTH CAROLINA
CHARLOTTE



[This Photo](#) by Unknown Author is licensed under [CC BY](#)



[This Photo](#) by Unknown Author is licensed under [CC BY-NC](#)



EEOC Guidance

- In April 2012, the EEOC issued its “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII.”
- The Guidance declares a hiring policy or practice that “screens out a Title VII-protected group” is unlawful unless the employer can show the policy or practice is “job related for the positions in question and consistent with business necessity.” In other words, an employer cannot have a blanket ban on hiring individuals with a criminal record.
- *In 2012, the State of Texas filed a lawsuit challenging the EEOC’s Guidance. In 2019, the Fifth Circuit Court of Appeals issued an injunction prohibiting the EEOC from enforcing the Guidance against the State of Texas*



EEOC Guidance

- Arrest
 - The fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. **However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.**
 - The conduct, not the arrest, is relevant for employment purposes. If, after an internal investigation, the applicant or employee is determined to have appeared to have done whatever he or she was arrested for and that conduct is job-related, adverse action would generally be justified.
 - ***Note: The Fair Credit Reporting Act prohibits background screening companies from reporting any arrest record or adverse non-conviction information older than seven years.***



EEOC Guidance

- Conviction
 - A record of a conviction will usually serve as sufficient evidence that a person engaged in particular conduct, given the procedural safeguards associated with trials and guilty pleas.
 - There may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction.
 - Example - The record has been expunged and should not have appeared on the background check report.



EEOC Guidance

- Two circumstances in which the EEOC believes employers will consistently meet the "job related and consistent with business necessity" defense are as follows:
 - The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); or
 - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.



EEOC Guidance

The EEOC guidelines focus on their “Green Factors” for employers to use to make a determination on how specific criminal conduct may be linked to particular positions. The three Green factors from a 1975 case called Green v. Missouri Pacific Railroad Company are:

1. The nature and gravity of the offense or conduct;
2. The time that has passed since the offense, conduct and/or completion of the sentence; and
3. The nature of the job held or sought.



EEOC Guidance

- The *individualized assessment* would consist of the following:
 - notice to the individual that he has been screened out because of a criminal conviction;
 - an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and
 - consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity.



Scenario

Leo, an African American man, has worked successfully as an account executive and has applied for a VP of Public Relations position at Model University. Twenty years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. During the intervening twenty years, Leo graduated from college and worked successfully in advertising and public relations without further contact with the criminal justice system. Leo's last supervisor served as a reference and assessed Leo as a talented, reliable, and trustworthy employee.

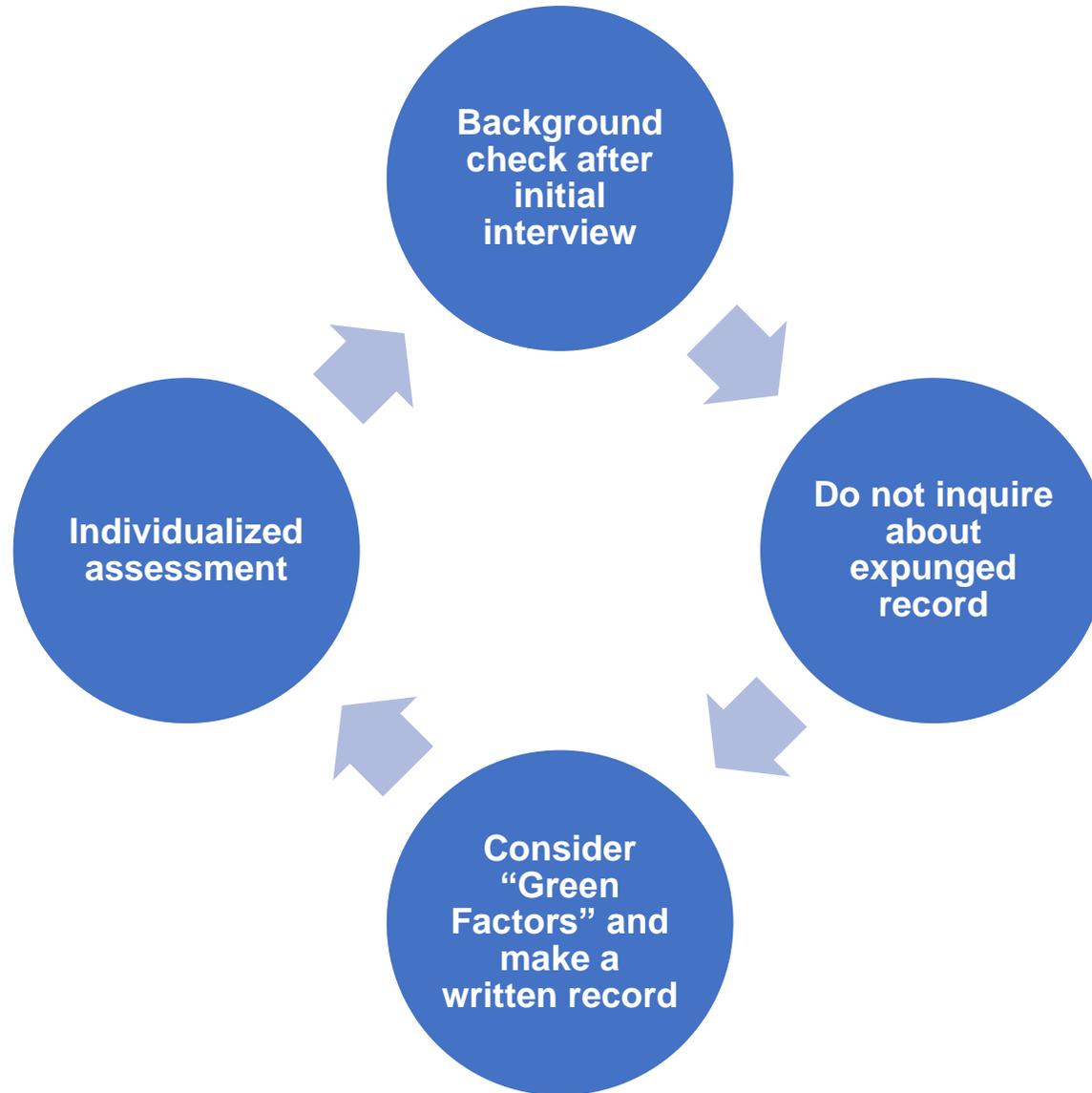
Model University is a highly respected institution and prides itself on employing only the "best of the best" for every position. Model University has adopted a policy under which it will not employ anyone with a conviction. The policy does not allow for any individualized assessment before exclusion.

Before interviewing Leo, the University learns about Leo's conviction through a background check and decides not to schedule him for an interview. The University refuses to consider Leo for the position despite Leo's experience and positive employment reference.

Poll Question 4

During an interview for an administrative staff position a candidate, while responding to a question about overcoming difficulties, disclosed she had previously been convicted of DWI as an adolescent. Now in her thirties, she explained that she learned her lesson and is now a responsible adult.

Practical Tips For Hiring





UNIVERSITY OF NORTH CAROLINA
CHARLOTTE

University Policy



UNC Policy Manual 300.8.7[R]

- Applies to pre-employment background checks
- Applies to all faculty and staff, including temporary employees and student employees
 - Does not have to include sworn law enforcement (because they have other comparable state-level standards)
 - Does not include student employees if their employment is incidental to their student status
- Implements minimum requirements for background check vendor, length of criminal history covered, confidentiality, etc.
- Other requirements incorporated into University Policy 101.23 (March 2022)



University Policy 101.23, Employment-Related Background Checks and Criminal Activity Reporting

- Originally implemented in Dec. 2013
- University conducts background checks on all persons at time of initial employment, certain individuals every five years, and certain volunteers/contractors
- Employees must report a conviction (excluding minor traffic violations) to the university
- All background checks are conducted in compliance with FCRA and Title VII



UP 101.23 – Background Checks

- Covered individuals:
 - Final candidate for all employee positions
 - Non-faculty employees every five years
 - Faculty employees with sensitive duties every five years
 - Current employees who assume new sensitive duties
 - For periodic Motor Vehicle Records (MVR) checks, any employees who drive a dedicated State vehicle as part of their job
 - Volunteers and contractors with sensitive duties



UP 101.23 – Background Checks

“Sensitive duties” =

- Direct responsibility for care/security of vulnerable populations (*e.g.* non-student minors or animals)
 - Note that University Policy 716, Minors on Campus requires annual background checks for individuals working with kids’ summer camps
- Direct access to, or responsibility for, cash, credit card, etc.
- Direct access to or responsibility for controlled substances, select agents, or hazardous materials
- Master key access to buildings, residence halls, or other secure facilities
- Direct access to, or responsibility for, information or areas designated by the University as safety or security sensitive



UP 101.23 – Background Checks

- Pre-employment (NEW)
 - Hiring managers cannot see applicants' answers to criminal history questions
 - University will not consider:
 - Applicant's expunged or pardoned convictions
 - Applicant's pending charges
 - Applicant's arrests without conviction
 - Charges that were dismissed or applicant was found not guilty
 - But University may consider applicant's conduct incidental to arrest if conduct is demonstrably related to job duties or access to institutional resources
 - Criminal history must be demonstrably job-related and consistent with business necessity to form basis for employment decision
 - University will provide applicant with information required by Fair Credit Reporting Act
 - Applicant has opportunity to explain circumstances and provide proof of rehabilitation



UP 101.23 – Reporting

- Employee is required to report a conviction to immediate supervisor or unit head ASAP and no later than the beginning of the next business day
 - May report to HR (staff) or AABP (faculty) instead
- Supervisors who receive notice must notify HR (staff) or AABP (faculty) within one business day



UP 101.23 – Assessment (NEW)

- For staff, the AVC for Human Resources, in consultation with Legal Affairs, determines whether adverse background check results impact employment decision
- For faculty, the Provost, in consultation with Legal Affairs, determines whether adverse background check results impact employment decision
- Factors considered:
 - Relationship of conduct to specific job duties and responsibilities;
 - The nature, gravity, and context of the events surrounding the conduct, as evidenced by the background check results and any supplementary information;
 - The time that has elapsed since conduct occurred and/or completion of any sentence served;
 - The applicant's or employee's demonstrated behavior since any conviction and the future potential for illegal activity by the applicant or employee; and
 - Any other extenuating circumstances documented by the applicant or employee or otherwise known to the University (e.g. the age of the applicant or employee at the time of the conduct, the totality of the circumstances, etc.).

Poll Question 5

You receive an email from a non-UNC Charlotte email account that states:
"You don't know me, but I know one of your long-time employees, Jackie Jones. Last year he was convicted of three different crimes, and UNC Charlotte doesn't seem to care. All I can say is that I wouldn't feel safe on your campus with people like Jackie roaming around."



UNIVERSITY OF NORTH CAROLINA
CHARLOTTE

Let's Think About It

- You learn that Katelyn Smith has pending charges for obtaining property by false pretenses. What are the university's options?
 - Job applicant or current employee?
 - Job duties at university?
 - Underlying facts of the charge?

Questions?



UNIVERSITY OF NORTH CAROLINA
CHARLOTTE