

Background Check Laws: Tennessee

by Ashley Robinson Li and Robert W. Horton, Bass, Berry & Sims, with Practical Law Labor & Employment

Status: Law stated as of 17 Jan 2025 | Jurisdiction: Tennessee, United States

This document is published by Practical Law and can be found at: content.next.westlaw.com/9-519-0222

Request a free trial and demonstration at: tr.com/practicallaw-home

A Q&A guide to background check and employment reference law for private employers in Tennessee. This Q&A addresses employers' obligations when conducting criminal and non-criminal background checks and penalties for violating these laws. Federal, local, or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see Background Check Laws: State Q&A Tool).

Overview of State Background Check Law

1. Please list each state statute or regulation governing background checks (for example, state equivalents of the federal Fair Credit Reporting Act and state law governing criminal background checks or driving records). Include law governing both criminal background checks and non-criminal background checks. For each, please:

- Provide a brief description of the statute or regulation.
- Identify which employers are covered.
- Identify which employees are covered (for example, all employees or only those in specific job functions, such as commercial driving).
- Describe whether it provides for a private right of action.
- Identify the state agency or entity that administers the statute.

Criminal Background Checks Required for Employees of Childcare Programs: T.C.A. § 49-5-413

Description

All applicants must:

- Agree to release all investigative records to the childcare program for examination for the purpose of verifying the accuracy of criminal violation information.
- Supply a fingerprint sample and submit to a criminal history records check to be conducted by the [Tennessee Bureau of Investigation](#) and the [Federal Bureau of Investigation](#).
- Pay all reasonable costs the first time the applicant applies, although the childcare program may reimburse the applicant for costs.

(T.C.A. § 49-5-413(a), (c).)

Employees of childcare programs also must undergo this process at least once every five years after employment (T.C.A. § 49-5-413(a)).

Covered employers must provide applicants with a copy of all criminal history records check documentation provided to the childcare program (T.C.A. § 49-5-413(c)).

Covered Employers

The law covers all childcare programs, including:

- A program operated by a local board of education.
- A church affiliated program, in certain circumstances.
- A public school administered early childhood education program.
- A federally funded early childhood education program.
- A school-administered head start or an even start program.

Background Check Laws: Tennessee

- A state-approved Montessori school program.
- A program operated by a private school, in certain circumstances.

(T.C.A. § 49-1-1102(3).)

The law also covers any person, corporation, or other entity that contracts with a school or childcare program if:

- Any employee of that entity would be in direct contact with children in a school or childcare program.
- The employee would have access to the grounds of the school or childcare center when children are present.

(T.C.A. § 49-5-413(d)(1)(A).)

For additional requirements for contractors, see T.C.A. § 49-5-413(d).

Covered Employees

The law covers any applicant applying for or holding a position either:

- As a teacher.
- Requiring proximity to children in a childcare program.

(T.C.A. § 49-5-413(a).)

Private Right of Action

The law does not provide for a private right of action.

State Agency

The [Tennessee Department of Education](#), [Tennessee Department of Children's Services](#), and [Tennessee State Board of Education](#) administer and enforce the law (T.C.A. §§ 49-5-413(e), 49-5-415, and 49-5-417).

Polygraph Examinations: T.C.A. § 62-27-128

Description

Employers cannot take any personnel action based solely on the results of a polygraph examination (T.C.A. § 62-27-128).

Covered Employers

The law covers all employers (T.C.A. § 62-27-128).

Covered Employees

The law covers all applicants and employees (T.C.A. § 62-27-128).

Private Right of Action

Employees may sue for wrongful discharge in violation of public policy, but the employee must prove that the decision was based solely on the polygraph examination (*Vick v. Krystal Co.*, 1991 WL 181852, at *4 (Tenn. Ct. App. Sept. 18, 1991)).

State Agency

The [Tennessee Department of Commerce and Insurance](#) administers and enforces this law (T.C.A. §§ 62-27-102(1), 62-27-112, and 62-27-122).

Other Background Check Laws

Several other categories of employees must also undergo criminal background checks as a condition of employment, including:

- Employees or volunteers of childcare agencies (T.C.A. §§ 37-5-511 and 71-3-507).
- Employees or volunteers of religious, charitable, scientific, educational, athletic, or youth service institutions (T.C.A. § 37-1-414).
- Employees of nursing homes or assisted-care living facilities (T.C.A. § 68-11-256).
- Employees of home care organizations (T.C.A. § 68-11-233).
- Employees of mental health and substance abuse organizations (T.C.A. § 33-2-1202).
- Employees or volunteers of adult day care centers (T.C.A. § 71-2-403).
- Emergency medical services apprentices in licensed ambulance services (T.C.A. §§ 68-140-302(17) and 68-140-333(a)(1)).

Non-Criminal Background Check Law

2. For each law identified in Question 1 addressing non-criminal background checks, list the key terms of art used and their definitions.

Polygraph Examinations: T.C.A. § 62-27-128

In Tennessee, “polygraph examiner” means any person who purports to be able to detect deception or verify truth of statements through instrumentation or by means of a mechanical device (T.C.A. § 62-27-102).

3. For each law identified in Question 1 addressing non-criminal background checks, please describe potential penalties for violations of the law.

Polygraph Examinations: T.C.A. § 62-27-128

This Tennessee law does not address potential penalties for violations.

4. For each law identified in Question 1 addressing non-criminal background checks, please describe the employers’ legal obligations, including obligations to provide notice to applicants or employees.

Polygraph Examinations: T.C.A. § 62-27-128

This Tennessee law does not address an employer’s legal obligations.

However, the law prohibits polygraph examiners from inquiring into certain areas during a polygraph test, which by extension affects the categories of information an employer may collect. Unless the examination is part of an investigation of illegal activity in one of the following areas and the inability to ask questions about the subject area would be detrimental to the investigation, a polygraph examiner may not ask an employee or applicant about:

- Religious, political, or union beliefs or affiliations.
- Beliefs or opinions about racial matters.
- Sexual preferences or activities.
- Disabilities covered by the Americans with Disabilities Act.
- Actions or activities more than five years before the date of the examination, except for felony

convictions and violations of the Tennessee Drug Control Act (T.C.A. § 39-17-401 to 39-17-456).

(T.C.A. § 62-27-123(d).)

5. For any law identified in Question 1 that functions as the state equivalent of the federal Fair Credit Reporting Act, please describe any significant differences between the state and federal law.

The Tennessee Consumer Protection Act (T.C.A. §§ 47-18-101 to 47-18-131), which prohibits unfair and deceptive business practices, has some overlapping provisions with the federal Fair Credit Reporting Act (FCRA), but they do not relate to the use of background checks in the employment context. Moreover, the FCRA preempts the overlapping provisions (see *Carney v. Experian Info. Sols., Inc.*, 57 F. Supp. 2d 496, 503 (W.D. Tenn. 1999) (reviewing Tennessee law)).

Criminal Background Check Law

6. For any law identified in Question 1 addressing criminal background checks, please identify the law and describe:

- The key terms of art.
- The potential penalties for violations.

Criminal Background Checks Required for Employees of Childcare Programs: T.C.A. § 49-5-413

Terms of Art

The key terms of art relating to criminal background checks required for employees of childcare programs include:

- **Childcare.** The provision of supervision, protection, and, at a minimum, the basic needs of a child or children for three or more hours a day, but less than 24 hours a day.
- **Childcare program.** Any place or facility that provides childcare for children in a before or after school-based program, including:

Background Check Laws: Tennessee

- a program operated by a local board of education;
 - a public school administered early childhood education program;
 - a church affiliated program, in certain circumstances;
 - a federally funded early childhood education program;
 - a school-administered head start or an even start program;
 - a state-approved Montessori school program; or
 - a program operated by a private school, in certain circumstances.
- **Child or children.** A person or persons under 18 years of age.

(T.C.A. § 49-1-1102(2), (3), and (4).)

Penalties

If an employee is convicted of an offense listed under T.C.A. § 49-5-413(d)(3)(B)(i) after their criminal background check, the employee must disclose the conviction to their employer within seven days of the conviction. An employee commits a Class A misdemeanor, punishable by fine only, if they knowingly fail to disclose the conviction within seven days. (T.C.A. § 49-5-413(d)(3)(C)(i), (ii).)

This Tennessee law does not otherwise address potential penalties for violations.

The Tennessee Department of Education may also assess civil penalties against childcare programs for failure to abide by its regulations related to program staff, including regulations related to background checks for employees (Tenn. Comp. R. & Regs. 0520-12-01-.16).

Other Criminal Background Check Laws

Certain professions have laws that require criminal background checks, some with their own terms of art and penalties for violations, including:

- Employees or volunteers of childcare agencies (T.C.A. §§ 37-5-511 and 71-3-507).
- Employees or volunteers of religious, charitable, scientific, educational, athletic, or youth service institutions (T.C.A. § 37-1-414).

- Employees of nursing homes or assisted-care living facilities (T.C.A. § 68-11-256).
- Employees of home care organizations (T.C.A. § 68-11-233).
- Employees of mental health and substance abuse organizations (T.C.A. § 33-2-1202).
- Employees or volunteers of adult day care cen(T.C.A. § 71-2-403).
- Emergency medical services apprentices in licensed ambulance services (T.C.A. §§ 68-140-302(17) and 68-140-333(a)(1)).

7. Please describe:

- The kind of criminal background information into which an employer may inquire, including obligations to provide notice to applicants or employees.
- The kind of criminal background information into which an employer may not inquire (for example, expunged or juvenile records).
- Any other circumstances under which a criminal background inquiry may be limited (for example, where there is no business necessity).
- Any additional requirements under the laws identified in Question 1.

Authorized Inquiry

Tennessee does not have any statutory provisions regarding what constitutes an authorized inquiry.

Unauthorized Inquiry

Tennessee does not have any statutory provisions regarding what constitutes an unauthorized inquiry.

When general inquiries are made by prospective employers, however, a criminal defendant granted expungement may rightfully deny or refuse to acknowledge being arrested, tried, or convicted (T.C.A. § 40-35-313(b); *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999)).

For additional information on state and local legislation limiting access to the criminal history information of job applicants, see [Ban-the-Box State and Local Laws Chart](#).

Other Limitations

There are no other limitations.

Additional Requirements

There are no additional requirements.

8. Please describe how an employer can collect criminal background information and what an employer can do with criminal background information, including:

- Whether and under what circumstances an application for employment in your state can include a question about convictions or arrests.
- Whether and under what circumstances criminal convictions or arrests can be used as a bar to employment generally.
- Whether and under what circumstances criminal convictions or arrests can be used as a bar to employment in specific jobs (such as childcare), including under any or all laws identified in Question 1.

Questions in Application

Tennessee law does not prohibit a private employer from asking about convictions or arrests on an employment application.

Bar to Employment

Tennessee law does not prohibit private employers from using convictions or arrests in making employment decisions.

Bar to Employment in Specific Jobs

Education and Youth-Serving Organizations

Childcare agencies may not employ or use as a volunteer any individual whose background check demonstrates a criminal history that involves:

- The physical, sexual, or emotional abuse or gross neglect of a child.
- An offense involving violence against a child or any person.
- An offense determined by the Tennessee Department of Children's Services to present a threat to the health, safety, or welfare of children.

- The identification of the individual on the [Tennessee Department of Health's vulnerable persons abuse registry](#).

(T.C.A. § 37-5-511(d)(1).)

Employees and volunteers at childcare agencies are barred from serving as drivers transporting children for five years after a conviction or felony plea for:

- Leaving the scene of an accident involving death, personal injury, or damage to vehicles or property (T.C.A. §§ 55-10-101 and 55-10-102).
- Driving under the influence of drugs or alcohol (T.C.A. § 55-10-401).
- Vehicular homicide (T.C.A. § 39-13-213).
- Any felony involving use of a motor vehicle while under the influence of an intoxicant.

(T.C.A. § 37-5-511(d)(2).)

Childcare programs may not permit an employee to come into direct contact with school children or enter the grounds of a childcare center when children are present if the employee has been convicted of certain offenses, including sexual offenses (T.C.A. § 49-5-413(d)(3)(B)).

Private schools and church-related schools must not employ or permit a person to drive a school bus who, within five years of applying for employment or to serve as a school bus driver, has been convicted of:

- Driving under the influence.
- Vehicular assault.
- Vehicular homicide.
- Aggravated vehicular homicide.
- Manufacture, delivery, sale, or possession of a controlled substance or a controlled substance analogue.

(T.C.A. § 49-6-2117(a).)

Mental Health, Substance Abuse, and Intellectual and Developmental Disabilities Organizations

An employer for a mental health or substance abuse organization may not hire, or otherwise permit to provide services, any individual listed on the Tennessee Department of Health's vulnerable persons abuse registry (T.C.A. § 33-2-1202(c)(2)).

9. If your state has a statute or regulation protecting the employment rights of persons with criminal records, please identify the statute or regulation and briefly describe the rights it confers.

Tennessee law permits the court to issue a “certificate of employability” if it finds that the person has established, by a preponderance of evidence, all of the following:

- The person has maintained a character of honesty, respectability, and veracity and is generally esteemed as this by the person’s neighbors.
- Granting the petition will materially assist the person in obtaining employment or occupational licensing.
- The person has a substantial need for the relief requested to live a law-abiding life.
- Granting the petition would not pose an unreasonable risk to the safety of the public or any individual.

(T.C.A. § 40-29-107(i).)

If the court grants the petition for employability, the person may use it to obtain employment (T.C.A. § 40-29-107(j)).

If a person presents a valid certificate of employability, no board, agency, commission, or other licensing entity can deny issuance, restoration, or renewal of an occupational license or certificate based solely on the person’s criminal record (T.C.A. § 40-29-107(m)(1)). However, a licensing entity may deny an occupational license or certificate based on either:

- The time that has elapsed since the criminal offense.
- The nature of the offense if it has a direct relation to the fitness or ability of the person to perform the duties or responsibilities related to the license or certificate.

(T.C.A. § 40-29-107(m)(4).)

The law also gives an employer immunity from claims of negligent hiring, retention, and supervision if the employer knew of the employee’s certificate of employability when the alleged negligence occurred (T.C.A. § 40-29-107(n)). However, an employer may be liable if all of the following apply:

- The employee, after being hired:
 - demonstrates danger; or
 - is convicted of a felony.
- The employer retains the employee after the demonstration of danger or felony conviction.
- The plaintiff proves the employer had actual knowledge that the employee was dangerous or was convicted of a felony.
- The employer, after having actual knowledge of the employee’s demonstration of danger or conviction of a felony, willfully retained the employee.

(T.C.A. § 40-29-107(n)(3).)

Employer Liability

10. Have courts in your jurisdiction recognized privacy claims brought by applicants or employees as a result of an employer’s conducting a background check? If so, please name any relevant cases and briefly describe their holdings.

Tennessee has recognized that the federal Fair Credit Reporting Act preempts any state law claims for invasion of privacy brought by a consumer against any user of information, except for information furnished with:

- Malice.
- Willful intent to injure the consumer.

(*Lamdin v. Aerotek Com. Staffing*, 2010 WL 3896154, at *4-5 (E.D. Tenn. Sept. 30, 2010) (applying Tennessee and federal law).)

11. Have courts in your jurisdiction recognized negligent hiring, negligent supervising, or negligent retention claims brought by employees, customers, or others associated with the employer as a result of allegedly flawed background checks? If so, please name any relevant cases and briefly describe their holdings.

Under Tennessee law, there is no general obligation to conduct background checks on every applicant,

Background Check Laws: Tennessee

especially those in routine, non-sensitive positions (*Gates v. McQuiddy Off. Prods.*, 1995 WL 650128, at *2 (Tenn. Ct. App. Nov. 2, 1995)).

Regarding employer liability for background checks that fail to disclose criminal conduct:

- If there is **no affirmative duty** to conduct a background check, the employer must have known about the criminal conduct for liability to arise. This requirement negates any claim based on a flawed background check that does not reveal an applicant's true history.
- If there **is a duty** to conduct a background check, and the check is flawed, the employer is not liable if a proper check would not have revealed the criminal information.

(*Borg v. J.P. Morgan Chase & Co.*, 2006 WL 2052856, at *11-13 (W.D. Tenn. July 21, 2006) (applying Tennessee law).)

Tennessee courts have recognized claims for negligent hiring and retention against an employer who knowingly hires an employee with a criminal history, or later learns the employee has a criminal history, and the employee then commits a criminal act. To prevail on a claim of negligent hiring or retention, a plaintiff must show more than an employer's knowledge of an employee's past criminal conduct. Specifically, there must be evidence that:

- The employee was unfit for the particular job.
- The employee would pose an unreasonable risk to others.
- The employer knew or should have known that the history of the criminal conduct would likely be repetitive.

(*Gates*, 1995 WL 650128, at *2.)

Tennessee courts have also recognized the tort of negligent supervision. To prevail on a claim of negligent supervision, a plaintiff must show that:

- The injury was a reasonably foreseeable probability, not just a remote possibility.
- Some action in the employer's power more probably than not would have prevented the injury.

(*Borg*, 2006 WL 2052856, at *12.)

Tennessee law gives an employer immunity from claims of negligent hiring, retention, and supervision if the employer knew of the employee's "certificate

of employability" when the alleged negligence occurred. However, there are limits to this immunity. (T.C.A. § 40-29-107(n); see Question 9.)

State Law Regarding References

12. If your state has any law governing employment references, please identify that law and:

- Describe any requirements for obtaining references for employees or applicants.
- Describe any requirements for giving references for employees or former employees (including any provision insulating employers from or exposing employers to liability because of references given).

Obtaining References

Tennessee law does not address requirements for obtaining references for employees or applicants generally. However, a person who applies with:

- A home care organization as a paid employee and provider of direct care to a patient must consent to provide past work and personal references (T.C.A. § 68-11-233(b)(3)).
- A mental health or substance abuse organization for a position that involves providing direct contact with or direct responsibility for service recipients, must provide past work and personal references. The prospective employer must communicate directly with:
 - the most recent employer the applicant identifies;
 - each employer the applicant identifies as having employed the applicant for more than six months in the past five years; and
 - at least two of the personal references the applicant identifies.

(T.C.A. § 33-2-1202(c)(1).)

Giving References

Employers are not required to give references. If an employer chooses to do so, the employer is presumed to be acting in good faith and is granted qualified immunity if the employer provides truthful, fair, and unbiased information. (T.C.A. § 50-1-105.)

The presumption of good faith is rebuttable on a showing by a preponderance of the evidence that the information the employer disclosed was any of the following:

- Knowingly false.
- Deliberately misleading.
- Disclosed for a malicious purpose.
- Disclosed in reckless disregard for its falsity or defamatory nature.
- Violative of the employee's civil rights under current employment discrimination laws.

(T.C.A. § 50-1-105.)

Social Networking for Background Checks

13. Are there statutes, regulations, cases, or any other guidance in your state on an employer's use of social networking or other online searches of applicants or employees for employment background check purposes? If so, please briefly characterize them.

Tennessee Employee Online Privacy Act of 2014: T.C.A. §§ 50-1-1001 to 50-1-1004

Tennessee employers may not:

- Request or require employees or applicants to disclose a password that allows access to their personal internet account.
- Compel employees or applicants to add the employer to their list of contacts associated with a personal internet account.
- Compel employees or applicants to access a personal internet account in the presence of the employer in a manner that enables the employer to observe the contents of their personal internet account.
- Take adverse action, fail to hire, or otherwise penalize employees or applicants for refusing access to personal internet accounts.

(T.C.A. § 50-1-1003(a).)

For more information on employer access to social media accounts, see [Practice Note, Employer Access to Social Media Accounts State Laws Chart: Overview](#).

The law defines "personal internet account" as an online account an employee or applicant uses exclusively for personal communications unrelated to an employer's business purpose, including:

- Emails.
- Instant messages.
- Text messages.
- Blogs.
- Podcasts.
- Videos.
- Other user-created profiles.

(T.C.A. § 50-1-1002(5).)

The law does **not** cover:

- Accounts created, maintained, used, or accessed by an employee or applicant for business-related communications or for a business purpose of the employer.
- Any electronic communications device, account, or service provided or paid for by the employer (in whole or in part).
- Disclosure of content for workplace investigations if there is specific information regarding the employee's compliance with applicable laws and regulations, work-related employee misconduct, or unauthorized transfer of the employer's confidential and proprietary information.
- Monitoring of employee accounts by financial services companies to comply with applicable securities regulations.

(T.C.A. §§ 50-1-1002(5)(B) and 50-1-1003(b).)

Artificial Intelligence for Background Checks

14. Are there any laws in your state addressing the use of artificial intelligence in conducting employment background checks? If so, please identify and describe their requirements.

Background Check Laws: Tennessee

Tennessee law does not regulate the use of artificial intelligence (AI) in employment background checks. For information on major proposed state legislation related to AI, see [US AI Law and Regulation: 2024 Tracker: Major Proposed State Legislation](#).

Additional Resources

15. If the state agency charged with oversight of background check or references laws in your state has useful online guidance or forms, please provide the link for those resources and a brief description of them.

The [Tennessee Department of Human Services](#) has a website regarding background checks for childcare employees.

16. Please describe any other significant background check or reference laws, cases, or requirements specific to your state not otherwise addressed in this survey.

There are no other significant background check or reference laws, cases, or requirements in Tennessee.

About Practical Law

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call 1-800-733-2889 or e-mail referenceattorneys@tr.com.