

EEOC Issues Enforcement Guidance on Employer Use of Criminal Records

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The Equal Employment Opportunity Commission (EEOC) has issued its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq* (Guidance).

This guidance is particularly relevant, as many employers ask for, and consider, an employee or applicant's criminal records prior to making an employment decision.

An employer's use of criminal history information may violate Title VII in two ways: first, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex or national origin.

Second, even where employers apply criminal record exclusions uniformly, the exclusions may still function to disproportionately exclude people of a certain race or national origin. This is referred to as "disparate impact discrimination" and is the root of the EEOC's concern evidenced in the recent guidance.

An unlawful disparate impact occurs when a neutral policy adversely affects individuals in a protected status, unless the employer can show that the challenged practice "is job related for the position in question and consistent with business necessity."

Statistics are at the heart of any disparate impact claim and they underlie the EEOC's concern over the use of criminal records. For example, 28 percent of all individuals arrested in 2010 were African American. In 2001, it was estimated that one out of 17 Caucasian males would be imprisoned during their life, compared to one out of six Hispanic men and one in three African American men. If employers were permitted to refuse employment to anyone who had been incarcerated, the toll on Hispanic and African American males would be enormous.

The EEOC is also concerned over the use of arrest records because many arrests never result in charges or convictions. The recent EEOC guidance states that "an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. By contrast, 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."

The EEOC allows employers to develop policies with “targeted exclusions” (i.e., excluding applicants from particular jobs based on specific criminal convictions which occurred within a defined period), but they must be based on a rationale that considers the criminal conduct, nature of the position at issue and “fact-based evidence, legal requirements, and/or relevant and available studies.” The employer must narrowly tailor the screening to criminal behavior with “a demonstrably tight nexus to the position in question.”

The EEOC suggests that the use of individualized assessments (rather than targeted exclusions) may better avoid Title VII violations. This requires the employer to advise a candidate that his record would exclude him from a particular job and provide the individual the opportunity to demonstrate that the exclusion does not properly apply to him. The employer must then consider whether, in light of the additional information, the policy applied to this individual is job related and consistent with business necessity.

In making this determination, employers should consider the following:

- The facts/circumstances surrounding the offense
- The number of offenses
- The age at time of offense and release from prison
- Whether, the individual has, post conviction, performed the same type of work with no known incidents of criminal behavior
- Length and consistency of employment record (pre and post conviction).
- Rehabilitation efforts such as education
- References and other information concerning fitness for position
- Whether individual is bonded

When the individual does not provide additional information, the employer is permitted to make its decision based on the information it has. However, the guidance places employers in a Catch 22 and states that following state or local laws that prohibit hiring individuals with certain criminal convictions is not a shield to Title VII liability if the employer is unable to show that the exclusionary policy or practice is job related and consistent with business necessity.

The guidance provides the following “best practices” for employment decisions:

- Eliminate policies/practices that automatically exclude individuals based on any criminal record
- Train decision makers about Title VII and its prohibitions, as well as about your policies and procedures

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- Develop a “narrowly tailored” written policy and procedure for screening based on criminal records
 - “Identify essential job requirements and the actual circumstances under which the jobs are performed
 - Determine the specific offenses that may demonstrate unfitness for performing such jobs” (based on all available evidence)
 - “Determine the duration of exclusions for criminal conduct based on all available evidence” (include individualized assessment)
 - Record your justifications for the policy/procedure
 - Record your consultations and research during the drafting of the policy or procedure

The EEOC also instructs employers to limit their inquiries during the hiring process concerning criminal records based upon the position in question and offenses which would be exclusionary consistent with business necessity. In other words, avoid asking on the job application whether the applicant has been convicted of a crime. And, finally, maintain the confidentiality of the information received.

While EEOC guidance does not have the force of law, it provides insight into the EEOC's enforcement standards. However, following the guidance will not necessarily avoid a Title VII violation. Employers should consult with the author or their Plunkett Cooney attorney as employment policies and procedures are developed.

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