

NEW GUIDANCE ON HIRING PRACTICES

DON'T JUDGE A BOOK BY ITS COVER - OR A JOB APPLICANT BY HIS OR HER RECORD

In April of this year, the EEOC 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 (Guidance), as amended, 42 U.S.C. § 2000e.¹ The Guidance is designed to be a resource for employers, employment agencies and unions covered by Title VII; for applicants and employees; and for its own enforcement staff.

While the Guidance doesn't outright prohibit employers from obtaining and using criminal background reports on job applicants or employees, the EEOC is seeking to ensure that such information is not used in a discriminatory way. How could an employer use an applicant's arrest or conviction record in a discriminatory manner?

Background: Title VII of the Civil Rights Act of 1964 already prohibits employers from treating job applicants or employees with the same criminal records *differently* because of their race, national origin or another protected characteristic. The law also prohibits disparate impact discrimination; in other words, if the use of criminal background checks acts to disproportionately exclude applicants of a particular race, national origin or other protected category, there could be a problem.² To avoid liability, the employer must then prove that the exclusions are "job related and consistent with business necessity" under Title VII.

In order to prove that an exclusion is "job related and consistent with business necessity" an employer can demonstrate that in screening applicants for prior criminal conduct, the firm: (1) considers at least the nature of the crime, the time elapsed since the criminal conduct occurred, the nature of the specific job under consideration, and (2) gives an applicant who is excluded by the screen the opportunity to show why he or she should not be excluded.



It appears that in order to comply with the second part of this test, the employer must inform the applicant of the reason why they were excluded from employment; thereby putting the issue on the table.

The new Guidance recognizes that in some industries, employers are subject to federal statutory or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations.³ The good news for employers is that compliance with federal laws and/or regulations is a defense to a charge of discrimination. But, the EEOC will coordinate with other federal departments and agencies, with the goal of maximizing federal regulatory consistency regarding the use of criminal history information in employment decisions.

EXAMPLE: EXCLUSION IS NOT JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY

Your Bank has a rule prohibiting anyone with convictions for any type of financial or fraud-related crimes within the last 20 years from working in positions with access to customer financial information, even though the federal ban is 10 years for individuals who are convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from serving in such positions.

Sam, who is Latino, applies to Your Bank to work as a customer service representative. A background check reveals that Sam was convicted of a misdemeanor for misrepresenting his income on a loan application 15 years earlier. Your Bank therefore rejects Sam, and he files a Title VII charge with the EEOC, alleging that the bank's policy has a disparate impact based on national origin and is not job-related and consistent with business necessity. Your Bank asserts that its policy does not cause a disparate impact and that, even if it does, it is job-related for the position in question, because customer service representatives have regular access to financial information, and depositors must have "100% confidence" that their funds are safe. However, Your Bank does not offer evidence showing that there is an elevated likelihood of committing financial crimes for someone who has been crime-free for more than 10 years. After establishing that the bank's policy has a disparate impact based on national origin, the EEOC finds that the policy is not job-related for the position in question and consistent with business necessity. Your Bank's justification for adding 10 years to the federally mandated exclusion is insufficient because it is only a generalized concern about security, without proof.⁴

BEST PRACTICES

The EEOC provides examples of best practices for employers who are considering criminal record information when making employment decisions.

- Generally, eliminate policies that exclude people from employment based on any criminal record.
- If asking questions about criminal records, limit inquiries to records for which the exclusion would be job-related for the position in question and consistent with business necessity.
- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
- 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.
- Determine the duration of exclusions for criminal conduct based on all available evidence.
- Record the justification for the policy and procedures.
- Note and keep a record of consultations and research considered in crafting the policy and procedures.
- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.
- Train managers, hiring officials and decision makers about Title VII and its prohibition on employment discrimination.

While this Guidance can seem like an additional burden on employers, it can also be seen as a roadmap to avoiding litigation or as a means to successfully defend your actions in the event that they are challenged. After all, isn't it better to have the Guidance in hand than to have to guess the views of the EEOC or other civil plaintiffs? We think so.

CONTACTS

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- ¹ The Guidance updates, consolidates and supersedes the Commission’s 1987 and 1990 policy statements on this issue, as well as the relevant discussion in the EEOC’s Race and Color Discrimination Compliance Manual Chapter.
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
 - ² Note that in 2008, the EEOC’s E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that **are** linked to race and color discrimination in the workplace.
 - ³ Exec. Order No. 12,067, 3 C.F.R. 206 (1978 Comp.).
 - ⁴ VI. Positions Subject to Federal Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct, A. Hiring in Certain Industries, Example 9. It is also further noted that Title VII doesn’t preempt federal statutes and regulations that govern eligibility for occupational licenses and registrations. Several federal statutes and regulations provide a mechanism for employers or individuals to appeal or apply for waivers of federally imposed occupational restrictions. As an example, unless a bank receives prior written consent from the Federal Deposit Insurance Corporation, an individual convicted of a criminal offense involving dishonesty, breach of trust, money laundering, or another financially related crime may not work in, own, or control “an insured depository institution” (e.g., bank) for 10 years under the Federal Deposit Insurance Act. To obtain consent, the insured institution must file an application for a waiver on behalf of the particular individual. Alternatively, if the insured institution does not apply for the waiver on the individual’s behalf, the individual may file a request directly for a waiver of the institution filing requirement, demonstrating “substantial good cause” to grant the waiver. Importantly, once the institution, or the individual, submits the application, the FDIC’s criminal record waiver review process requires consideration of mitigating factors that are consistent with Title VII, including evidence of rehabilitation and the nature and circumstances of the crime.