

EEOC ISSUES UPDATED GUIDANCE REGARDING AN EMPLOYER'S USE OF CRIMINAL RECORDS WHEN MAKING EMPLOYMENT DECISIONS

I. Overview

These days, more and more employers are performing background checks on job candidates before offering them a job. Employers are concerned about their potential liability if an employee with a criminal record does something illegal or injurious when on the job.

On April 25, 2012, the U.S. Equal Employment Opportunity Commission issued updated guidance on the rules governing an employer's use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended.¹

The EEOC is responsible for the enforcement of Title VII, which is a federal law prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin. Although Title VII does not specifically regulate an employer's use of criminal records, the EEOC has long viewed an automatic exclusion of all individuals with a criminal record as a form of unlawful racial or national origin discrimination.

The issuance of the new EEOC Guidance presents an ideal opportunity for reminding employers that the use of criminal background information in making employment decisions may subject employers to Title VII liability unless they know how to avoid such liability.

Under Title VII, an employer may be liable for discrimination if it:

- Engages in intentional discrimination; or
- Adopts a neutral policy or practice that excludes persons of a particular race or national origin in greater numbers than the general population (known as disparate impact discrimination).

This legal alert will discuss how criminal background checks, when improperly used, may unwittingly make an employer liable for disparate impact discrimination. It also explains how employers can avoid such claims by following the EEOC's suggested best practices for employers.

II. Liability under Title VII

An employer may be subject to liability under Title VII if it engages in intentional discrimination. For example, an employer can be found liable for intentional

¹ Available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm ("EEOC Guidance").

discrimination if it denies an African American applicant employment based on his or her criminal record, yet hires a similar Caucasian applicant with a comparable criminal record. The EEOC Guidance gives the following example to illustrate intentional discrimination based on race:

- John, who is Caucasian, and Robert, who is African American, are both recent college graduates of the same university. They both have similar skill sets and work experience. They both pled guilty to charges of possessing and distributing marijuana in high school, which is the only offense on their criminal records. After college, they both apply for a job at Office Jobs, Inc. After the initial interview, the employer obtains John's and Robert's permission to conduct a background check, which makes the employer aware of their drug convictions. The employer representative decides not to refer Robert for a follow-up interview because [they] cannot afford to refer "these drug dealer types." The same employer representative refers John for a second interview stating that his "youth at the time of the conviction and his subsequent lack of contact with the criminal justice system make the conviction unimportant."

In the above example, the EEOC concludes that Office Jobs, Inc. has treated John and Robert differently based on race and has intentionally violated Title VII.

An employer may also be found liable if it engages in disparate impact discrimination. This occurs when the employer engages in a practice that does not appear discriminatory on its face, but has a more negative impact on one group of individuals than another.

For example, an employer who automatically excludes all applicants who have been arrested for drug offenses in the last 10 years may believe this policy is not discriminatory because it treats applicants of all races and national origins the same. However, under the EEOC Guidance, the employer may actually be liable for discrimination if the evidence shows that the policy excludes certain minority groups in greater numbers than the general population.

III. Defense of Disparate Impact Liability

A significant amount of the EEOC Guidance discusses how an employer can justify using a policy that excludes job applicants who have a criminal record. To defend the use of such a screening policy, an employer must show that the policy is related to the job in question and consistent with business necessity.

First, the EEOC distinguishes between arrest records and criminal conviction records. The EEOC takes the position that employers should not rely only on arrest records when making employment decisions because "arrests are not proof of criminal conduct."² Employers may, however, "make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question." For example, a nonprofit that provides a mentoring program for grade school children may be justified in excluding someone who has been arrested for a sex offense if there is evidence, aside from the arrest alone, that the individual engaged in the behavior in question.

² EEOC Guidance at 12.

By contrast, a criminal conviction makes it more likely that the individual did in fact engage in the criminal conduct at issue. Yet, the EEOC still recommends that employers not ask about all convictions on job applications. If an employer decides to ask about criminal records, the EEOC recommends that the employer limit its questions to the type of criminal conduct for which the exclusion would be job-related for the position in question and consistent with business necessity.

Next, to show that a policy or practice is job-related for the position in question and consistent with business necessity, the EEOC believes employers will “consistently meet” this standard if the employer takes into consideration:

- the nature and gravity of the offense or conduct,³
- the time that has passed since the offense or conduct and/or completion of the sentence,
- the nature of the job held or sought, and
- an individualized assessment of people excluded by the screen to see if the policy as applied to the individual is job related and consistent with business necessity.⁴

³ The EEOC states that “the nature of the offense or conduct may be assessed with referenced to the harm caused by the crime (*e.g.*, theft causes property loss). The legal elements of a crime also may be instructive...With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies.” EEOC Guidance at 15.

⁴ See 29 C.F.R. § 1607.5. An employer may also meet the requirements of the law if it can show that there is a statistical correlation between the criminal conduct and subsequent work performance. To properly use statistical data, employers should

The EEOC suggests that, in addition to following these four steps, an employer conduct an individualized assessment that would:

- Provide notice to the individual that he or she has been screened out because of a criminal conviction;
- Provide an opportunity for the individual to show that the exclusion should not be applied because of his or her particular circumstances; and
- Take into consideration whether the additional information provided by the individual calls for an exception to the exclusion and shows that the policy applied in these circumstances is not job related and consistent with business necessity.

If the individual does not respond to the employer’s request for additional information, the EEOC states that the employer may make its employment decision without the information. The EEOC also states that an individualized assessment is not always required, but is recommended to avoid liability for discrimination.

The EEOC provides the following example to illustrate a criminal exclusion that is not job-related and consistent with business necessity:

- The employer uses online applications for all positions at the company. Before any applicant may submit an

reference the EEOC Uniform Guidelines on Employee Selection Procedures.

online application, an applicant must answer certain questions, including “have you ever been convicted of a crime?” If the answer is yes, the online system automatically ends the application process, and the applicant views a screen that states “Thank you for your interest. We cannot continue to process your application at this time.” The employer does not have any record of the reasons it adopted the policy exclusion, and it does not have data to show that convictions for all offenses make all applicants an unreasonable risk in all jobs.

Based on the above example, the EEOC concludes that if the applicant files a complaint with the EEOC and shows that the policy excluded more members of one race or nationality than the others, the EEOC would find reasonable cause to believe that the blanket exclusion was not job-related and consistent with business necessity. In other words, the policy fails to satisfy the job-related and business necessity test because all convictions are not relevant to all of the employer’s jobs, and the policy fails to consider the applicant’s individual circumstances.⁵

Keep in mind that excluding anyone with a criminal conviction without individually assessing the applicant’s individual situation is probably going to raise concerns with the EEOC. Thus, the EEOC gives the following example to show how an employer should individually review an applicant with a criminal conviction.

- An employer rents meeting rooms and other facilities to various

⁵ Additional examples that may be helpful to employers can be found on pages 16 and 17 of the Guidance.

organizations. The employer has a rule prohibiting anyone with a conviction for theft crimes (*e.g.*, burglary, robbery, larceny, identity theft) from working in a position that requires an individual to handle personal financial information for at least four years after the conviction or release from jail. This rule was chosen by the employer based on data from the county Corrections Department, national criminal data, and recent recidivism research for theft crimes. The employer also offers an opportunity for individuals who are screened out by the policy to provide information to show that the exclusion should not apply to that individual.

The EEOC concludes that the above policy is job-related and consistent with business necessity because it is “carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and that policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct.”⁶

The EEOC also cautions employers to avoid the rationale that “we only hire the best of the best” to support a particular policy or practice. The EEOC believes that a defense of this nature does not meet the business necessity standard because it lacks factual support for the belief that having a conviction equates to poor job performance, and it fails to show all convictions create a risk in all of the employer’s jobs at any time. In general, the EEOC disapproves of blanket criminal conduct exclusions because they

⁶ Additional examples that may be helpful to employers can be found on pages 18 and 19 of the Guidance.

discriminate on the basis of race and national origin.

And even if an employer can show its policy or practice is job-related for the position in question and consistent with business necessity, a plaintiff's claim of discrimination may still prevail if he or she can show that there is a less discriminatory alternative employment practice - such as reconfiguring a job so that the criminal conviction is no longer relevant - that serves the employer's legitimate business needs, and the employer did not adopt that practice.

IV. Exceptions to Title VII Liability

The EEOC recognizes that there are times when an employer must reject an applicant with a criminal background, regardless of the circumstances surrounding the conviction. Therefore, it provides for the following exceptions, which clearly allow an employer to refuse employment to an applicant with a record of criminal conduct when:

- Federal law or regulations establish specific criminal conduct exclusions for certain jobs. (However, if the employer's policy exceeds the scope of the federal law, the employer can be found liable for going beyond the scope of the federal requirement); and
- The position in question is subject to national security requirements that are imposed by federal law and the adverse employment action resulted because of a denial or revocation of a security clearance.

On the other hand, compliance with state or local laws that require criminal conduct exclusions will not serve as a defense unless

the employer can demonstrate that the exclusion was job-related and consistent with business necessity.

For example, suppose state law provides that a job applicant with a criminal conviction for a sex crime cannot work in a day care center, and the center would lose its license if it hired the applicant. In that case, the employer should be able to show that it was not a violation of Title VII to refuse to hire the applicant because the criminal behavior was job-related and the exclusion was a business necessity.

V. Best Practices

Finally, the EEOC Guidance encourages employers to adopt the following best practices when considering criminal background information in employment decisions:

1. Eliminate blanket criminal conduct exclusion policies.
2. Develop narrowly tailored written policies and practices to screen applicants and employees for criminal conduct.
3. Train staff on Title VII's prohibition against employment discrimination and how to implement new policies and procedures in compliance with Title VII.
4. Identify the essential job requirements and the circumstances under which all jobs are performed.
5. Identify specific criminal conduct that may show an applicant is unfit for the position.
6. Identify the appropriate period of time that must pass until a criminal record is

no longer relevant in hiring someone for the position in question (using the “individualized assessment” discussed above).

7. Record the justification for the policies and procedures and keep a record of all consultations and research considered in creating policies and procedures consistent with Title VII.

VI. Conclusion

In light of the updated Guidance from the EEOC, employers should review their job applications and criminal conduct exclusion policies, as well as their training related to these matters.

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