

EEOC Issues New Enforcement Guidance on the Use of Criminal Background Checks

The U.S. Equal Employment Opportunity Commission (EEOC) recently issued new Enforcement Guidance with respect to an employer's consideration of arrest and conviction records in employment decisions. The guidance discusses employer practices that the EEOC considers permissible and impermissible based on its interpretation of Title VII of the Civil Rights Act of 1964. It bars the use of arrest records alone in making adverse employment decisions. The guidance also requires that any policy excluding individuals with past convictions from consideration for a position be narrowly-tailored to both the position in question and business necessity.

Best practices. The EEOC suggests that employers eliminate policies or practices that exclude individuals from employment based on their having any criminal record whatsoever, as this will never be consistent with business necessity. Additionally, employers using criminal background information in employment decisions should create a narrowly-tailored written policy that is guided by the factors detailed below – the nature and gravity of the offense, time passed since the offense, and the nature of the job held or sought. It also suggests that employers limit criminal history inquiries to records that would require exclusion from the position at issue. Employers should also keep in mind that when conducting a background check on applicants or employees, they must comply with the Fair Credit Reporting Act (FCRA).

While the EEOC's guidance is not binding law, it is the standard the EEOC will use when evaluating discrimination complaints based on the use of criminal history information in employment decisions.

New York employers should keep in mind that New York state law, discussed at the end of this Alert, includes a prohibition on any inquiry into or use of arrest records that did not lead to a conviction. It also limits the use of conviction records in employment decisions. Failure to follow New York law is a separate source of potential liability, as employers can be sued under both state and federal law for discriminatory use of criminal history information.

Analysis of the EEOC's Guidance

Title VII bars discrimination on the basis of race, national origin, sex, and religion. The guidance distinguishes between two types of Title VII violations: disparate treatment and disparate impact.

Disparate treatment. In the criminal history context, a disparate treatment violation occurs when an employer treats criminal history information differently for different applicants or employees based on a Title VII-protected characteristic. Evidence of disparate treatment can include biased statements, inconsistencies in the hiring process, and statistical analysis of an employer's employment data, among other things.

Disparate impact. A disparate impact violation occurs when an employer's race-neutral policy disproportionately impacts some individuals protected under Title VII. The guidance largely concerns this type of violation. The EEOC states that "data [indicating nationally higher arrest, conviction, and incarceration rates for African-Americans and Latinos than Whites] supports a finding that criminal record exclusions have a disparate impact based on race and

national origin." Because of this, using criminal history information in a manner that screens out certain minorities is a disparate impact violation *unless* the employer can demonstrate that the policy or practice is job-related for the position in question and is consistent with business necessity.

A policy or practice job-related for the position in question and consistent with business necessity. The guidance explains that for an exclusionary policy to meet this standard, an employer has two options. It may conduct a validation study on the criminal conduct screen pursuant to the EEOC's Uniform Guidelines on Employee Selection Procedures, an onerous process few employers take advantage of at this time. See 29 C.F.R. § 1607. Alternatively, employers can develop a "targeted screen" that considers the three *Green* factors described in detail below. Generally, the employer should then provide an opportunity for an individualized assessment of those people excluded by the screen to determine whether the policy as applied to them meets the job-related and business necessity standard.

Green factors. The employer's screen should consider three factors that were identified in an Eighth Circuit case, *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977), to evaluate whether a criminal record exclusion is job-related for the position in question and consistent with business necessity. Those factors are:

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

In considering the nature and gravity of the offense, the EEOC expects employers to evaluate what type of crime occurred (e.g. theft, assault, etc.) and the severity of the crime, including whether it was a misdemeanor or felony conviction.

When evaluating the time passed since the offense, the EEOC recommends that criminal conviction exclusions specify the duration of the exclusion and, generally, that the duration not be permanent. Beyond this, it merely notes that whether the duration of an exclusion meets the business necessity standard "will depend on the particular facts and circumstances of each case." While this statement is not particularly revelatory, an example in the EEOC's Guidance suggests that extending the length of an exclusion based on a "generalized concern" about safety or theft, without more specific "proof" of a risk (such as a recidivism study), may not be sufficient to satisfy the business necessity standard.

Finally, the EEOC expects employers to engage in a factual inquiry about the precise nature of the job and why a criminal history exclusion is appropriate for the specific position. This includes considering the job's duties, essential functions, and the circumstances and environment in which the job is performed. The employer should then link those considerations to the criminal conduct at issue to establish that any exclusion or negative inference is job-related and necessary to the business.

Individualized assessment. The guidance explains that this assessment should consist of 1) notice to the individual that she was screened out because of a criminal conviction, 2) an opportunity for the individual to demonstrate that the exclusion should not apply due to her particular circumstances, and 3) employer consideration of whether that information warrants an exception to the policy because, as applied, it is not consistent with business necessity. The individual could theoretically include any information, including evidence that the criminal record is inaccurate or other relevant facts that suggest the applicant or employee should not be screened out of the employment opportunity.

The EEOC notes that an employer may be able to justify an exclusion based on the *Green* factors *without* an individualized assessment. Such a screen "would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question." But the EEOC also explains that an individualized assessment can help employers avoid Title VII liability by allowing them to consider more complete information.

Arrest records. The EEOC stresses that arrests are not proof of criminal conduct and, standing alone, cannot be used to take an adverse employment action without violating Title VII. But information about an arrest can trigger the employer to look further into whether the conduct underlying the arrest justifies such an action. While that conduct could be relevant and justify excluding an individual, the guidance states that relying on an arrest record alone is never job-related and consistent with business necessity.

New York state law requirements. New York's Executive Law § 296(16) controls the use of arrest records in employment matters. It bars employers from taking any adverse employment action against a prospective or current employee based on the existence of an arrest record that 1) is no longer pending and 2) was terminated in the employee's favor. The law bars employers from even inquiring about such arrest records. But in at least some circumstances, the employer may be free to consider "independent evidence of the conduct leading to the criminal charges." See *Skyline Inn Corp. v. New York State Liquor Auth.*, 44 N.Y.2d 695, 696 (1978).

New York Correction Law 23-A controls the use of criminal conviction records in employment decisions within the state. It states that no adverse employment action may be taken against a prospective or current employee because of her previous criminal convictions unless 1) there is a direct relationship between the offense(s) and the specific employment sought or held, or 2) the granting or continuation of employment would involve unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

In making such a determination, the law requires that the employer consider eight factors. These include, among others, specific job duties, time elapsed since the occurrence of the criminal offense, the seriousness of the offense, and any information produced by the person relating to her rehabilitation or good conduct. Finally, at the request of a person denied employment because of her criminal history, a New York employer must provide her with a statement regarding the reasons for the denial within 30 days. ♦

If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

Lisa Cleary	212.336.2159	lccleary@pbwt.com
Ellen Martin	212.336.2860	emmartin@pbwt.com
Catherine A. Williams	212.336.2207	cawilliams@pbwt.com
Adam E. Pinto	212.336.2156	apinto@pbwt.com

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