



Hiring the Convicted Criminal (or Not)

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The EEOC recently released new guidance for employers explaining when criminal records may be used by employers in making employment decisions without violating Title VII of the Civil Rights Act of 1964 ("Title VII"). Although Title VII forbids employers from discriminating on the basis of race, color, religion, sex, or national origin, a decision not to hire based on criminal records usually implicates either a race or national origin claim. The new EEOC guidance does not change the law, it simply explains the EEOC's position more fully.

When an employer treats an individual differently because of being in a Title VII class, disparate treatment discrimination may be established. Title VII disparate treatment claims are more intuitive. For example, if you have two similarly situated applicants, one Caucasian and one African-American, both of whom have a history of a misdemeanor conviction in high school, there would be a potential disparate treatment claim if the African-American applicant is excluded for being "untrustworthy" because of the conviction while the Caucasian applicant is hired.

Disparate impact claims are more problematic for employers. This type of claim arises when an employer's seemingly neutral policy or practice disproportionately affects a Title VII protected class. Thus, an employer's policy of not hiring anyone with an arrest record disparately impacts African-American and Hispanic men because members of those groups are arrested disproportionately to their percentage of the population.

Employers can rebut disparate impact claims by establishing that the policy in question is both "job related and consistent with business necessity." Criminal conduct exclusions will generally meet these standards if the employer:

- Validates its screening process under the Uniform Guidelines on Employee Selection Procedures; or
- Takes into account the nature of the crime, time elapsed, and nature of the job, and then provides a personal assessment for excluded individuals.

However, even if the employer uses these steps, a plaintiff can prevail by showing a less discriminatory policy would have achieved the employer's goals, but the employer refused to adopt it.

Employers should be aware that exclusions based solely on arrest records are not "job related and consistent with business necessity" because arrests do not indicate guilt. After all, "innocent until proven guilty" is one of the pillars of our legal system. However, employers may exclude an applicant based on the conduct that caused him to be arrested, just not for being arrested. Conviction records are usually more reliable, but are not infallible. Therefore the EEOC cautions employers to ask only about convictions for which exclusion will be "job related and consistent with business necessity."

Title VII does not preempt federal laws or regulations that prevent individuals convicted of specific crimes from working in particular industries or from obtaining certain occupational licenses or security clearances. These restrictions will be enforced. However, similar state or local statutes are preempted if their provisions permit employers to perform acts that are illegal under Title VII. Thus, a state or local law may permit an employer to exclude based on criminal records, but the policy must still be "job related and consistent with business necessity" to avoid violating Title VII. Rest assured that the EEOC will be ramping up its inspection of employer policies in this area. Please contact DBL if you have questions or would like your current policy reviewed.