



USE OF CRIMINAL BACKGROUND CHECKS IN THE HIRING PROCESS: WHAT NEW EEOC GUIDELINES MEAN FOR EMPLOYERS

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A criminal background is a common, and often useful, component of the hiring process for many employers. However, in light of recent pronouncements by the United States Equal Opportunity Commission (EEOC), employers should think twice before automatically conducting criminal background checks on all applicants.

In 2012 the EEOC issued new guidelines regarding the use of criminal background checks in the hiring process. The new guidelines prohibit the use of broad-based blanket exclusions of any applicant with an arrest or criminal history. Rather, the EEOC's new guidelines require a more nuanced approach that considers various factors including the nature of the crime, the time elapsed and the nature of the job. The new guidelines further require the employer to make an individualized assessment to determine whether its policy as applied is job related and consistent with a "business necessity."

There are two ways in which an employer's use of criminal background checks may violate the Title VII of the Civil Rights Act of 1964 (Title VII) prohibition of employment discrimination based upon race, sex, religion and national origin. Title VII prohibits employers from engaging in "disparate treatment" of employees, *i.e.*, treating job applicants with the same criminal backgrounds differently based upon race, religion, sex or national origin. Title VII also prohibits "disparate impact" discrimination. "Disparate impact" liability exists where an employer applies a neutral policy that uniformly excludes applicants based upon certain criminal conduct, but the

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exclusion still disproportionately excludes applicants of a certain race or national origin. There can be "disparate impact" liability under Title VII where an employer's criminal record screening policy disproportionately screens out members of Title VII-protected group, and the employer does not demonstrate that the policy is job related for the positions in question and consistent with business necessity.

To establish that a rejection of an applicant based on criminal conduct that has a disparate impact is "job related" and "consistent with business necessity," the employer must "show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." The EEOC explains that the employer can meet the "job-related and consistent with business necessity" defense where the employer develops a targeted screening process that considers at least the nature of the crime, the time elapsed and the nature of the job. Further, the employer's policy must provide an opportunity for an individualized assessment for those people excluded by the screen to determine if the policy as applied is job related and consistent with business necessity.

The individualized assessment should include (1) notice to the individual that he has been screened out because of a criminal conviction, (2) an opportunity for the applicant to demonstrate that the exclusion should not be applied due to his particular circumstances, and (3) consideration by the employer as to whether additional information provided by the applicant warrants an exception to the exclusion.

Recognizing the potential difficulty applying these guidelines, the EEOC offers what it deems to be "best practices" for employers considering use of criminal record information when making employment decisions:

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

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- 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.
- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.
- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

Despite these "best practices," the EEOC guidelines put employers that conduct criminal background checks in a legally precarious position. The guidelines neglect safe harbors and put an undue burden on small-sized employers specifically, which may have trouble understanding what the EEOC expects of them. At a minimum, to the extent an employer seeks to use criminal background checks, it must exercise caution.

For more information concerning the EEOC's guidelines and how the changes may affect your hiring practices, please contact Michael Rowan (rowan@shumakerwilliams.com) of Shumaker Williams, P.C.'s Employment Law Group.

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