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### **EEOC Updates Guidance on Criminal History**

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On April 25, 2012, the federal Equal Employment Opportunity Commission issued its updated *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, 42 U.S.C. § 2000e. The EEOC previously issued policy statements on the issue in 1987 and 1990, and referenced the topic in the 2006 Race and Color Discrimination Chapter of its Compliance Manual.

The updated Guidance incorporates recent social science and criminological research, case law, and information about various state and federal laws in an effort to educate employers. This article summarizes the EEOC's updated Guidance by answering "frequently asked questions" about the use of criminal history in the employment process. The full text of the Guidance can be found at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

#### ***Is criminal history a "protected class" like race or national origin?***

Title VII prohibits discrimination on the basis of race, color, religion, sex and national origin. It does not prohibit discrimination on the basis of criminal history. However, national data suggests that discriminating against applicants and employees with criminal records, while not "illegal" under federal law, does have a disparate impact based on race and national origin.

#### ***What is "disparate impact" discrimination?***

Disparate impact discrimination is "unintentional" discrimination. It occurs when an employer's facially neutral policy (e.g., a policy excluding applicants from employment based on certain criminal conduct) disproportionately impacts some individuals protected under Title VII (e.g., racial minorities). The Supreme Court first recognized that Title VII permits disparate impact claims in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), and the disparate impact analysis was later codified by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k).

#### ***Does this mean all criminal history exclusions are unlawful?***

It depends. In order to overcome a disparate impact challenge, an employer's policy regarding criminal history must be "job related and consistent with business necessity." In order to examine this standard, one must first distinguish arrests from criminal convictions.

#### ***Are exclusions based on ARREST records "job-related and consistent with business necessity"?***

The EEOC takes the position that, unlike criminal convictions, arrests do not establish that criminal conduct has occurred (i.e., a person is "innocent unless proven guilty"). Consequently, exclusions based on arrest records are, in and of themselves, not "job related and consistent with business necessity." However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the particular position in question. Under these circumstances, the EEOC suggests an employer investigate the conduct and give the individual a chance to tell his/her side of the story.

#### ***Are exclusions based on CRIMINAL CONVICTIONS "job related and consistent with business necessity"?***

The updated Guidance lists two circumstances in which criminal conviction exclusions will be "job related and consistent with business necessity."

The first circumstance is where the employer validates the criminal conduct exclusion in accordance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. part 1607. This process typically involves examining social science data about criminal conduct as related to subsequent work performance, although the EEOC notes that such social science studies are rare at this time.

The second circumstance is where the employer develops a "targeted screen" that considers at least the factors outlined in *Green v. Mo. P.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977). The "Green factors" include (1) the nature of the crime, (2) the time elapsed, and (3) the nature of the job. The EEOC also suggests an employer conduct an "individualized assessment" when a person is identified by the screen to determine if the policy *as applied to that particular individual* is job related and consistent with business necessity. According to the Guidance, employers should consider the following factors when conducting an individualized assessment:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts (e.g., education/training);
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

***Once the employer determines its policy is "job related and consistent with business necessity," has the employer satisfied its obligation?***

Even if an employer's policy or practice is job related and consistent with business necessity, the employer still must consider whether there is a less discriminatory alternative employment practice that serves the employer's legitimate goals as effectively as the challenged policy or practice.

***What about laws or regulations that conflict with Title VII?***

The EEOC Guidance clarifies that compliance with other federal laws and/or regulations that conflict with Title VII (e.g., federal laws and/or regulations that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations) is a defense to a Title VII discrimination charge. On the other hand, state and local laws and regulations are preempted by Title VII if they "purport to require or permit the doing of any act which would be an unlawful employment practice" under Title VII.

Employers also should remember to check for applicable state and local laws that provide employees with greater protection than Title VII. For example, New York Executive Law § 296(16) prohibits employers from asking an individual about (1) an arrest, not then pending, that was resolved in his/her favor; (2) a sealed record; or (3) a youthful offender adjudication. Additionally, New York Correction Law Article 23-A requires employers consider and balance a variety of factors before terminating employees or refusing to hire applicants with prior criminal convictions. These factors are aimed at determining whether there is a "direct relationship" between the conviction and the employment sought, or whether granting the employment would involve an "unreasonable risk to property or to the safety and welfare of specific individuals or the general public."

***What are some suggested "best practices" for employers?***

Section VIII of the EEOC's updated Guidance suggests employers:

- Eliminate policies or practices that exclude people from employment based on any criminal record whatsoever.
- Train hiring managers on avoiding unlawful discrimination and the proper use of criminal history in making employment decisions.
- Develop a narrowly-tailored written policy and procedure for screening applicants and employees for criminal conduct.

- Do not ask about criminal convictions on job applications. According to the EEOC, an employer is more likely to assess an applicant's criminal history objectively when it is already familiar with the applicant's qualifications and experience. Therefore, the EEOC believes employers are better off asking about criminal history later on in the application process.
- If and when asking questions about criminal records, limit inquiries to records for which exclusion would be "job related and consistent with business necessity."
- Keep criminal history information confidential and only use it for the purpose for which it was intended.

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