

EEOC Issues Guidance on Criminal Background Checks

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A common screening device used by employers during the selection process is the criminal background check. However, an employer's use of criminal record information during its selection process may violate Title VII. This point was recently reinforced by the Equal Employment Opportunity Commission ("EEOC"), the agency that enforces federal laws prohibiting employment discrimination.

This spring, the EEOC issued 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 stated by the EEOC Chair Jacqueline A. Berrien when the agency issued the Guidance, "the new guidance clarifies and updates the EEOC's longstanding policy concerning the use of arrest and conviction records in employment, which will assist job seekers, employees, employers, and many other agency stakeholders." In light of the EEOC's Guidance on the use of arrest and conviction records, employers should carefully evaluate their policies and procedures in this area.

The Guidance addressed both arrest records and convictions and distinguishes the way that employers can use these types of records. The use of arrest records as a bar to employment will always be viewed with suspicion by the EEOC. This is because the EEOC believes that arrests are not reliable evidence that a person has actually committed a crime. An employer may, however, deny employment based on conduct underlying an arrest where that conduct indicates that the applicant would be unfit for the position in question.

Employer screening devices that contain provisions for the automatic exclusion of applicants because of arrest or conviction records may disproportionately exclude African-Americans and Hispanics, thereby creating a disparate impact on those



minority groups. In such cases, the EEOC will find that the employer's policy is in violation of Title VII.

This was the situation in which Pepsi Beverages ("Pepsi") recently found itself. Based on its investigation, the EEOC found reasonable cause to believe that the criminal background policy used by Pepsi discriminated against African-Americans in violation of Title VII. To resolve the matter, Pepsi agreed to pay \$3.13 million to resolve a charge of race discrimination based on a criminal background check policy that disproportionately excluded black applicants from employment.

Under Pepsi's policy, job applicants who had been arrested pending prosecution were not hired for a permanent job even if they had never been convicted of any offense. Pepsi also denied employment to applicants for

employment who had been arrested or convicted of certain minor offenses.

In addition to the monetary relief, Pepsi will offer employment opportunities to victims of the former criminal background check policy who still want jobs at Pepsi and are qualified for available positions. The company will supply the EEOC with reports on its hiring practices under its revised background check policy. Pepsi will also conduct Title VII training for its hiring personnel and all of its managers.

When an employer's criminal background policy is challenged, the employer must be able to "demonstrate that the challenged [policy] is job related for the position in question and consistent with business necessity." The Guidance describes two circumstances in which the EEOC believes employers will consistently

meet the “job related and consistent with business necessity” defense. One is validation of the criminal background policy pursuant to the EEOC’s Uniform Guidelines on Employee Selection Procedures. The second way is by developing a targeted screen that considers at least the nature of the crime, the time elapsed, and the nature of the job. In addition, the employer’s policy must provide an opportunity for an individualized assessment of the situation. The individualized assessment would include notification to the individual that he/she may be excluded from consideration because of past criminal conviction, an opportunity for the individual to demonstrate that the exclusion does not properly apply to him/her and then consideration whether, based on the new information provided by the individual, the policy as it applies to the individual is still job-related and consistent with business necessity.

In addition to policies that have a disparate impact on protected groups, an employer’s criminal background policy may also be found to be in violation of Title VII on the basis of disparate treatment. For example, there is Title VII disparate treatment liability where the evidence shows that an employer rejected an African-American applicant based on his/her criminal record but hired a similarly-situated white applicant with a comparable criminal record. According to the EEOC’s recently issued Guidance, there are different types of evidence that can be used to establish that race, national origin, or other protected characteristics influenced or motivated an employer’s use of criminal records in a selection decision. This kind of evidence can include: biased statements that express group-related

stereotypes about criminality or inconsistencies in the hiring process, which can be found when background checks are requested more often for individuals with certain racial or ethnic backgrounds.


The EEOC Guidance recommends the following “Employer Best Practices” for employers considering criminal record information when making employment decisions.

General considerations:

1. Eliminate policies or practices that exclude people from employment based on any criminal record.
2. Train managers, hiring officials, and decision-makers about Title VII and its prohibitions on employment discrimination.

Developing a Policy:

1. Develop a narrowly-tailored written policy and procedures for screening criminal records. Identify essential job requirements and the actual circumstances under which the jobs are performed.
2. Determine specific offenses that may demonstrate unfitness for performing such jobs. Identify criminal offenses on all available evidence.
3. Determine the duration of exclusions for criminal conduct based on all available evidence. Include an individualized assessment.
4. Record the justification for the policy and procedures.

An employer’s implementation of these EEOC-recommended “Employer Best Practices” should serve to minimize an employer’s liability in this area. 

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