



## Virginia Workplace Law

# Criminal Background Checks Can Backfire

By: Mike DeCamps on Thursday, May 3rd, 2012

Criminal background checks have always been somewhat of a controversial tool for hiring decisions. The **EEOC** has previously issued several guidance statements calling into question **employment** policies that exclude any job candidate with a criminal record. On April 25, the EEOC issued a further guidance document on this subject.

We have discussed some concerns about background checks before, **here** and **here**. While recognizing that criminal background checks are not prohibited by **Title VII of the Civil Rights Act**, by a four to one vote, the EEOC set forth its position very clearly. Employers will violate Title VII if they intentionally discriminate among individuals with similar **criminal histories** (i.e. race or national origin discrimination) or if their policies have a disproportionate adverse impact based on race, national origin or some other protected status and employers are unable to demonstrate "business necessity" for utilizing an applicant's criminal history in making a hiring decision.

Employers should examine their **background screening** policies based on this recent guidance from the EEOC. Clearly, the EEOC has moved in the direction of urging employers to conduct individualized assessments when utilizing criminal background information. The EEOC would like employers to only request information that is job related. The real rub is the practical difficulty and burden that individualized assessments pose. Currently, most employers have a question on their application that inquires if applicants have ever been convicted of a crime or in some cases ever been arrested. Alternatively, employers may simply request an applicant to provide an authorization to obtain a complete criminal history from an appropriate database. If employers do not particularize such inquiries, or at a minimum scrutinize the particulars of the negative information received on a case-by-case basis, then they may find themselves with too much information and this can be dangerous.

Industry advocates for employers are also raising interesting and challenging questions about the recent guidance. One lobbying group was pleased that the EEOC guidance was an improvement over earlier versions but still concerned that the guidelines recommend banning employers from asking the standard question on applications about prior criminal convictions or arrests.

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Commentators rightfully have wondered about the risk of having too little information and drawing a complaint alleging negligence in hiring. Another industry advocate has raised legitimate questions about the interaction between the guidance and certain state laws that may be in conflict.

In the end, the essence of good practice comes down to employers making sure that they are consistently applying their decisions about applicants who have a criminal background history and that these decisions do not have a **disparate impact** on those protected by Title VII of the Civil Rights Act. If decisions are being made on arrests alone, the focus must be on the conduct that led to the arrest when such conduct makes an applicant unfit for a position. Each case is individual and must be assessed as such, taking state and federal law into consideration, and the need to make consistent decisions that are able to be justified by business necessity.

Most hiring practices almost always benefit from review by an attorney familiar with these laws and recent decisions. You can contact one of our **Virginia employment attorneys** if you have any questions about the recent EEOC ruling or other aspects of your hiring practices.

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