



# New EEOC Guidance Prompts Reevaluation of Criminal Screening Policies

by Nathan A. Adams, IV, Lindsay Dennis Swiger, and Michael M. Gropper

**JUST WHEN** most churches have made criminal background screening standard to avoid harm to children, the elderly, and other vulnerable persons and liability, the federal government has issued guidance reminding employers that, unless criminal screening policies are carefully designed and implemented properly, the policies themselves can confer liability under Title VII of the Civil Rights Act of 1964 (Title VII).

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) released Enforcement Guidance on the use of criminal histories when making employment decisions. Much of the Guidance summarizes existing law pertaining to an employer's use of an applicant's criminal history. The primary departure or elaboration on precedent in the Guidance is that the EEOC now strongly recommends that employers make an "individualized assessment" before taking adverse action based on an applicant's or employee's criminal history.

Churches which are not careful to follow the Guidance and related law are vulnerable in particular to two types of Title VII claims: "disparate treatment" and "disparate impact" claims.

## **DISPARATE TREATMENT**

Disparate treatment may be the best known Title VII claim. It requires employees or prospective employees to prove that the employer treated them dissimilarly in comparison to similarly-situated persons based on a protected classification such as race, national origin, or

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gender. An employer may be subject to Title VII liability for disparate treatment if, for example, it rejects a Hispanic applicant based on his criminal history, but hires a similarly-situated white applicant with a similar criminal history.

To avoid disparate treatment liability, churches must distinguish applicants based upon factors that are unrelated to a protected category. For example, employers may look to the date of conviction, the seriousness of the infraction, or the age of the applicant at the time of conviction.

### DISPARATE IMPACT

An employer may be liable for “disparate impact” discrimination under Title VII if (1) a prospective employee demonstrates the employer’s neutral background screening policy disproportionately screens out a group protected by Title VII and (2) the employer fails to demonstrate the policy is job-related and consistent with business necessity. According to the EEOC, racial minorities may be able to meet the first test, because African-Americans and Hispanics are arrested and incarcerated at rates two to three times higher than their representation in the general population.

Implicit in the Guidance is a more defined two-step approach for the employer to avoid disparate impact claims. The two-step approach requires that employers (1) establish a lawful screen policy based on a targeted exclusion narrowly tailored to identify specific criminal conduct that poses an unacceptable risk with regard to the position in question and (2) conduct an individualized assessment of all applicants affected by the screen.

### TARGETED SCREEN POLICY

The first step is to establish a targeted screen policy, which is narrowly tailored to identify specific criminal conduct that poses an unacceptable risk with regard to the position in question. In determining whether a screen is narrowly tailored, the EEOC adopted these factors announced by the Eighth Circuit Court of Appeals in *Green v. Missouri Pacific Railroad*:

- The nature and gravity of the offense or conduct,
- The time that has passed since the crime and/or completion of sentence, and
- The nature of the job held or sought.

First, criminal conduct may be assessed relevant to a job requirement based on the harm caused or the legal elements of the crime committed. For example, a church may consider theft and its elements such as deception, trickery or fraud as relevant to a particular job.

Second, the EEOC did not state how old is too old for a criminal conviction to affect hiring. Instead, this factor turns on the facts and circumstances of each case and depends, in part, on how much the risk of recidivism declines over time. Permanent exclusions for select offenses may be justified (e.g., exclusion of pedophiles from childcare), but not for all of them.

Third, a church must link the criminal conduct to the essential functions of the particular job that is subject to the screen.

In evaluating the job in question, a church may take into account job title, the nature of the job duties, the job’s essential functions, the circumstances under which the job is performed, and the environment in which the job duties are performed.

### INDIVIDUALIZED ASSESSMENT

The second—and more onerous—step for churches to avoid Title VII liability is to conduct an individualized assessment of all applicants sifted out by the screen. Individualized assessment requires the church to inform each applicant of their potential exclusion; provide the individual an opportunity to demonstrate that the exclusion should not apply (e.g., if the individual was not correctly identified in the criminal record); and evaluate whether any additional information supplied by the applicant shows that the policy as applied is not job-related or consistent with business necessity.

The church should also consider other factors in making the individualized assessment, such as the facts and circumstances surrounding the offense, the

## Best Screening Practices

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decision makers about Title VII and its prohibitions on employment discrimination.
- Develop a narrowly tailored written policy 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 based on all available evidence.
  - Determine the duration of exclusions for criminal conduct based on all available evidence.
  - Include an individualized assessment.
  - 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 decision makers 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. For example, do not request information regarding motor vehicle offenses if the job at issue does not include driving.
- Keep information about applicants’ and employees’ criminal records confidential.

number of offenses for which the individual was convicted, the individual's age at the time of conviction, and the individual's past employment history. Applicants who fail to respond to an employer's attempt to gather information forfeit their opportunity to provide additional information, and the employer may make its decision without the information.

### ARRESTS

Some churches take into account arrests when hiring. This is a mistake. The EEOC has long taken the position that arrests alone are insufficient to establish criminal conduct, noting that many arrests do not result in criminal charges, and even if charged, the individual is presumed innocent until proven guilty. Of course, a church may consider admitted conduct underlying an arrest when making a hiring decision if the conduct makes the individual unfit for the position in question.

### CONCLUSION

Churches have no choice but to review the criminal histories of applicants to avoid negligent hiring, but the new EEOC Guidance reminds us that it would be a

mistake for churches to adopt a per se ban on hiring individuals for mere arrests or indiscriminate crimes without regard to the position concerned based on the information the applicant shares or the church learns from law enforcement records.

Instead, churches must apply a more discriminating policy reviewed by church-state counsel using the Green factors to determine which convictions require further review, and then conduct an individualized assessment of those applicants subject to disqualification. As a result, churches should disqualify applicants with particular criminal convictions from specific jobs for which the person is unfit, but in some cases enable the same person to serve in other capacities.

Because the Guidance signals that the EEOC will now focus on criminal screening policies, it is a good time for churches to reevaluate how they screen employees and applicants and, if necessary, incorporate new hiring steps in the process. Although this will require some work, the result should be a screening policy that better balances the doctrines of grace and wisdom. 

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