



LABOR & EMPLOYMENT

ALERT

EEOC ISSUES ENFORCEMENT GUIDANCE ON EMPLOYERS' USE OF ARREST AND CONVICTION RECORDS

By Erin T. Fitzgerald

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) issued enforcement guidance on how an employer's use of arrest and conviction records could violate Title VII of the Civil Rights Act of 1964, as amended (Title VII). The guidance covers a variety of topics including but not limited to the following: 1) how an employer's use of criminal history in making employment decisions could violate Title VII; 2) the difference between the treatment of arrest records and conviction records; 3) compliance with other federal laws and regulations that prohibit employment of individuals with criminal records; and 4) best practices for employers.

Title VII does not explicitly prohibit employers from obtaining and relying upon arrest or conviction records in making hiring decisions; however, an employer still may violate Title VII by using that information. The EEOC's enforcement guidance sets forth two scenarios involving criminal records that may result in an employer's violation of Title VII. First, an employer cannot treat job applicants' criminal histories differently because of any protected classification including race, color, religion, sex or national origin. If the employer does treat those applicants differently based upon a protected classification, the employer would be seen to have engaged in disparate treatment discrimination in violation of Title VII. Second, an employer cannot exclude applicants with criminal records in a way that disproportionately and unjustifiably excludes people of a specific race or national origin from employment. Even

if the employer applies criminal records exclusions uniformly, if those exclusions result in a disproportionate number of applicants of a certain race being excluded, the employer will have violated Title VII unless it can show that the exclusions were job related and consistent with business necessity.

The enforcement guidance provides two circumstances under which an employer can meet the job related and consistent with business necessity standard. One circumstance is if the employer validates the criminal conduct exclusion in light of the EEOC's Uniform Guidelines on Employee Selection Procedures (if data about criminal conduct as related to subsequent work performance is available and such validation is possible). The other circumstance is if the employer develops a targeted screening process considering at least the nature of the crime, the time elapsed, and the nature of the job. The employer then would make an individualized assessment of whether those individuals identified by the screen pose an unacceptable level of risk and should be excluded by doing the following: 1) notifying the individual that he or she has been screened out because of a criminal conviction; 2) providing an opportunity for the individual to demonstrate that the exclusion should not be applied in his or her particular circumstances and 3) considering whether the additional information provided by the applicant warrants an exception to the exclusion and has shown that the policy as applied is not job related or consistent with business necessity. Title VII does not require an individualized

assessment in all circumstances but the EEOC's guidance notes that individualized assessments can help employers avoid Title VII liability by allowing the employer to consider more complete information.

The guidance also notes that there is a distinction between arrest records and conviction records. As the EEOC sees it, an arrest does not establish that criminal conduct occurred. An exclusion based on an arrest is therefore not job related and consistent with business necessity unless the underlying conduct makes the individual unfit for the job. The conduct, not the arrest, is relevant for employment purposes.

Notably, the enforcement guidance provides that Title VII does not preempt federal laws and regulations that prohibit the employment of individuals with criminal records. However, an employer cannot impose an exclusion that goes beyond the scope of the federally imposed restriction. Title VII does preempt state imposed restrictions. Therefore an employer's exclusionary policy, even if applied to comply with state law, must be job related and consistent with business necessity because the fact that the employer adopted it to comply with state or local law does not shield the employer from liability under Title VII.

Some best practices for employers to protect against violating Title VII when using criminal records information are the following:

- Train managers, hiring officials and decision makers about Title VII and its prohibition on employment discrimination.
- 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 an unfitness for performing such jobs.
- Determine the duration of exclusions for criminal conduct based on all available evidence.
- Include an individualized assessment of applicants and employees.
- Document the justification for the policy and procedures.
- Train managers, hiring officials and decisionmakers on how to implement your policy and procedures consistent with Title VII.

Keep in mind that the state or locality in which your business operates may have more restrictive laws on obtaining criminal records for use in employment decisions. Be sure that your policies comply with both state, federal and local laws. For information on an employer's obligations when obtaining criminal records information in Philadelphia, please review a previous Alert entitled "[Ban the Box: No Criminal Records Inquiries During the Application Process.](#)"

For more information about this Alert, if you have any questions or concerns about your current application procedures or if you have questions about implementing procedures to comply with the EEOC's enforcement guidance, please contact Erin T. Fitzgerald at 215.299.3832 or efitzgerald@foxrothschild.com or any member of Fox Rothschild's [Labor & Employment Department](#).



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