

Legal Update

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New EEOC Enforcement Guidance on Employers' Use of Criminal Records

By Jonathan Vegosen

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued an [Enforcement Guidance](#) regarding the use of criminal records in employment decisions. Entitled "Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964," the Guidance consolidates, updates, and supersedes the EEOC's previous policy statements issued over 20 years ago.

The EEOC has issued the Guidance due to the significant increase in the number of Americans who have had contact with the criminal justice system. While Title VII of the Civil Rights Act does not list a criminal record as a protected basis, African Americans and Hispanics are arrested and incarcerated at higher rates than the general population. Thus, an employer's use of an individual's criminal history in making employment decisions may violate the prohibition against employment discrimination on the basis of race or national origin under Title VII.

Discrimination can occur under two theories of liability: "disparate treatment" and "disparate impact." Under the disparate treatment theory, an employer can be held liable when the employer treats a person with the same qualifications and criminal history differently based on race or national origin. For example, the EEOC will find disparate treatment liability where an employer rejected a Hispanic applicant based on his criminal record but hired a similarly situated white applicant with a comparable criminal record.

Under the disparate impact theory, an employer can be held liable when its facially neutral criminal record screening policy or practice disproportionately excludes a protected group and the employer fails to demonstrate that the policy or practice is job related and consistent with business necessity. An employer has the opportunity, however, to show that its policy or practice does not cause a disparate impact. For example, an employer may present regional or local data that contradicts the national data that African Americans and Hispanics are arrested at numbers disproportionate to their representation in the general population.

If the EEOC finds that there is a disparate impact, an employer must show that its policy is "job related for the position in question and consistent with business necessity." The EEOC highlights three factors relevant to this analysis: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense and/or completion of the sentence; and (3) the nature of the job held or sought.

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When considering the nature and gravity of the offense or conduct, the Guidance draws a crucial distinction between arrest and conviction records. An arrest does not establish that criminal conduct has occurred. The EEOC further cautions employers not to rely on arrest records because they may be inaccurate or incomplete. Thus, the EEOC does not consider an arrest as proof of criminal conduct, and “an arrest record standing alone may not be used to deny an employment opportunity.”

Illinois law supports this distinction. Illinois employers may consider prior criminal convictions in making employment decisions. It is a civil rights violation under the Illinois Human Rights Act, however, for employers to use an arrest or expunged, sealed, or impounded criminal history record information in making any employment decision.

By contrast, the EEOC usually considers a conviction as reliable evidence that a person engaged in criminal conduct. If an employer does choose to ask about convictions, the employer should limit its inquiries to convictions for which exclusion would be job related and consistent with business necessity.

To establish that a criminal conduct exclusion policy is job related and consistent with business necessity, the policy must link specific criminal conduct with the risks inherent in the duties of a particular position. The EEOC identifies two ways an employer can consistently meet this requirement: (1) validating the criminal conduct screen per the Uniform Guidelines on Employee Selection Procedures standards; or (2) developing a targeted screen and providing an individualized assessment for those excluded by the screen.

Thus, an employer may use targeted screens, such as a policy excluding individuals from particular positions for specified criminal conduct within a defined time period. An employer may not have a policy requiring a permanent exclusion from all employment based on any criminal conduct. Such a policy is not consistent with the business necessity standard because it does not focus on the dangers of particular crimes and the risks in particular positions and therefore will violate Title VII.

While Title VII does not require individualized assessments, the EEOC recommends their use to avoid liability. An individualized assessment includes: (1) notice to the individual that he or she has been screened out because of a criminal conviction; (2) an opportunity for the individual to demonstrate that the exclusion should not be applied; and (3) consideration by the employer as to whether the additional information provided by the individual warrants an exception.

The employment applications of many employers ask applicants if they have ever been convicted of a crime. The EEOC Guidance suggests that this kind of inquiry should not be made, but if an employer does make it, the employer should restrict it to those kinds of convictions that are job related to the position and consistent with business necessity. Another strategy might be to include a disclaimer like the following: “A conviction may be relevant if job related but will not necessarily disqualify an applicant from employment.”

Another thing to consider with regard to convictions and employment applications is state law wrinkles. For example, the Illinois Criminal Identification Act prohibits an employer from considering expunged or sealed records of conviction or arrest when making employment decisions. Moreover, employment



applications must contain specific language stating that an applicant is not obligated to disclose sealed or expunged records of conviction or arrest.

The EEOC Guidance concludes by sharing some “best practices” for employers:

- Eliminate policies or practices that exclude people based on any criminal record;
- Develop a narrowly tailored written policy for screening of criminal conduct that considers the nature of the offense; the time that has passed since the offense; and the nature of the job;
- Record the justification for the policy and the research considered in crafting the policy;
- Train managers, hiring officials, and decision makers about Title VII, employment discrimination, and applicable federal and state laws; and
- Limit inquiries about criminal records to records for which exclusion would be job related for the position in question and consistent with business necessity.

This Legal Update only briefly summarizes some of the many significant provisions of the EEOC Enforcement Guidance. Employers should carefully scrutinize their use of criminal history information in employment decisions and consult with counsel for further information and assistance.

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