

Use of Arrest and Conviction Records in Employment May be Discriminatory

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RISK CONTROL

Should employers have blanket policies that prohibit employing individuals with criminal conviction records? The Equal Employment Opportunity Commission (EEOC) says they should not.



In April 2012, the EEOC issued Enforcement Guidance No. 915.002, "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" ("Guidance"). It warns that blanket policies and practices that exclude all individuals with any type of criminal conviction record from employment may be discriminatory and in violation of Title VII.

One Size Does Not Fit All

Criminal background checks have long been an important part of the hiring process. These routine checks are valuable in mitigating the risk of negligent hiring claims. They can help prevent employers from hiring a worker charged with sexual harassment or who had a recent criminal conviction for sexual assault. Criminal record checks may also ensure that individuals, who were recently convicted of theft or fraud, are not hired as bank tellers.

However, background checks can lead to unintended consequences. For example, a decades-old marijuana possession conviction may preclude a perfectly capable, reformed, 50-year old person from earning a job in which he or she may excel.

Blanket policies may result in "disparate impact discrimination," a neutral policy or practice that has a discriminatory effect on a protected class or classes, even though no intent to discriminate exists. The EEOC references research indicating certain protected classes, such as African American and Hispanic men, have higher rates of criminal convictions. Thus, disqualifying an individual based upon a criminal conviction could have a disparate impact on those protected classes, and would violate Title VII unless an employer can prove that its policy is "job-related and consistent with business necessity."

Background Checks and Screening Process – EEOC Guidance

Background checks remain legal and critical to the hiring process. But, rather than maintaining a blanket policy against employing individuals with conviction records, the EEOC encourages employers to develop narrowly tailored policies and targeted screens based upon each particular job to ensure exclusions are job-related and consistent with business necessity. The screening process, according to the EEOC, should focus on the:

- Nature and dangers of the crime in question.
- Time elapsed since the crime was committed.
- Nature and risks of the particular job.

The EEOC further proposes that individuals with criminal records be offered individualized assessments. Such reviews would allow the individual to provide information employers may consider in determining whether the factors excluding those individuals from employment are, indeed, job related and consistent with business necessity.

The Guidance also indicates that the EEOC will defer only to federal laws that prohibit individuals with certain criminal convictions from holding certain jobs. Any employer that follows a state or local law which prohibits an individual with certain criminal convictions from holding a particular job must still demonstrate that its policy is job-related and consistent with business necessity. An employer cannot rely solely on a state or local law to provide justification for such an exclusion from employment.

The EEOC cautions that "convictions" and "arrests" are not the same. An arrest does not prove criminal conduct occurred, so excluding an individual from employment based solely upon an arrest record will not be job related or consistent with business necessity, and therefore, a violation of Title VII. However, an employer may make an employment decision based upon the conduct underlying the arrest if, after a factual inquiry, the employer determines the conduct that occurred renders an individual unfit for the position being filled.

Risk Control Recommendations

To comply with the Guidance and to mitigate the risks inherent in hiring:

- Avoid across-the-board policies that automatically prohibit the employment of an individual based upon any criminal conviction.
- Write narrowly tailored policies and procedures to govern the use of criminal background checks.
- Review job descriptions and determine which specific criminal convictions that may render an individual unfit for a particular job.
- Determine whether certain criminal conduct may be excused after a given time period, and if so, how many years should be relevant.
- Document the justification for the policy and procedures, including consultations and research considered in crafting the policy and procedures.
- Consider individualized assessments of applicants with criminal backgrounds.
- Consider removing questions regarding criminal arrests and convictions from employment applications. Such questions may be asked in another form once a criminal background check is completed.
- Focus on the dangers of particular crimes and the risks in specified positions when discussing criminal records with applicants.
- Train hiring officials, managers and others involved in the recruitment and hiring process about Title VII prohibitions against discrimination, and train them to implement the employer's policy and procedures.

Since the Guidance is not law, it remains unclear the extent to which the courts will agree with the EEOC's position, although courts typically defer to the EEOC's interpretation of Title VII. What is clear is that an employer should consult with an employment attorney to review and revise its policies and practices regarding criminal convictions before such policies and practices are challenged by the EEOC. Discrimination is against the law, and blanket policies that prohibit the employment of individuals with conviction records are more likely to be held as discriminatory, exposing employers to costly claims.

Additional Resources

EEOC Enforcement Guidance, "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e et seq." No. 915.002 (4/25/12).

A summary of the examples provided by the EEOC in the Guidance can be found [here](#).

What You Should Know about the EEOC and Arrest and Conviction Records: http://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm

Questions and Answers about the EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII: http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm



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