

## New EEOC Enforcement Guidance on Criminal Background Checks

By:



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The EEOC recently approved, by a 4-1 vote, a new set of Enforcement Guidance on criminal background checks. The guidance supersedes and consolidates two previous policy statements on the subject. As discussed further below, this new guidance discourages blanket exclusions of applicants who have been convicted of crimes. Instead, employers are encouraged to use individualized assessments. Employers should analyze whether excluding a potential employee based upon criminal conduct is job related and consistent with business necessity. This new guidance clarifies and expands the range of conduct whereby a criminal background check may run afoul of Title VII and as such creates a greater risk of liability for employers.

The basis for the EEOC's guidance is a so-called "disparate impact" analysis. Courts have long recognized that if an employer has a policy which is non-discriminatory on its face, but which in practice disproportionately affects a protected class, that employer can be liable under Title VII unless the policy is job related and a business necessity. A common example of such a policy is a physical fitness standard for a public safety job. Those policies often disparately impact female applicants. Accordingly, police and fire departments have been required to demonstrate that the fitness standards they employ actually correspond to the demands of the job. In connection with criminal background checks, the EEOC has determined that the use of such checks as a screening tool could have a disparate impact on minority applicants.

As a result of the EEOC's new guidance, employers who employ criminal background screens will now bear the burden of proving that such a screen is "job re-

lated and consistent with business necessity.” The Commission explained that an employer can meet this standard, and justify excluding employees based on a criminal conviction by:

- Developing a narrowly tailored policy that considers, at least, the nature of the crime, the time elapsed and the nature of the job. Further, the employer’s policy should provide an opportunity for an individualized assessment for those people identified by the initial screening, to determine if the policy, as applied, is job related and consistent with business necessity; or
- Validating the criminal background exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures. Specifically, the employer must show there is data or analysis about criminal conduct as related to subsequent work performance or behaviors.

The Guidance strongly encourages employers who conduct criminal background checks to ensure that their policy for conducting such checks includes an “individualized assessment.” An individualized assessment generally means that an employer informs an applicant that he may be excluded because of past criminal conduct and provides the applicant with an opportunity to demonstrate that the exclusion does not properly apply to him. The employer would then consider whether the additional information supplied by the applicant shows that the policy, as applied to that person, would be job related or consistent with business necessity. The guidance contains a laundry list of “relevant individualized evidence” including:

- The facts or circumstances surrounding the offense;
- Age of the applicant at the time of the conviction as compared to at the time of application;
- Evidence that the employee has performed the same type of work post-conviction without incident;
- Rehabilitation efforts; and
- Employment or character references.

The Guidance also sets forth a host of “best practices” for employers to utilize and some helpful steps on developing a criminal background check policy that complies with Title VII. These include:

- Identify essential job duties for each position and specific types of criminal offenses that may demonstrate unfitness for performing those duties;
- Eliminate any policies that impose a complete bar to employment based on any type of conviction;
- Including an individualized assessment in the policy;
- Training managers, hiring decision makers and other supervisory personnel regarding the appropriate use of a criminal history in hiring and promotion;
- Do not ask applicants for disclosure of convictions that are not job related and consistent with business necessity; and
- Keep information conviction history confidential.

The EEOC’s policy statement includes a list of policies or practices which are now deemed verboten. An employer may not make a decision to deny employment based on an arrest record (as opposed to a conviction)

alone. However, the employer can take into account the conduct underlying the arrest if it makes the individual unfit for the position. Likewise, an employer that has an automatic, universal exclusion from all employment opportunities because of any type of criminal conduct would now be at odds with Title VII according to the guidance.

Finally, an employer who conducts background checks pursuant to another federal statute has a valid defense to a claim of disparate impact discrimination so long as the employer does not go beyond what the statute requires. However, the Guidance is more circumspect when it comes to state or local laws which mandate background checks. As a federal statute, Title VII preempts or trumps state laws which are inconsistent with it. For example, no state could pass a law permitting employers within its border to discriminate on the basis of gender or religion. However, as a practical matter, employers should be able to show that a background check was a “business necessity” and “job related” if it was required by a state law or regulation.

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