

EEOC Cautions Against Making Employment Decisions Based on Criminal Records

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Using arrest and conviction records as a basis for employment decisions may violate Title VII if employers fail to take certain precautionary measures, according to the Equal Employment Opportunity Commission's latest enforcement guidance, which was released on April 25, 2012. The new guidance consolidates and clarifies prior EEOC guidance in light of judicial decisions on the use of arrest and conviction records.

The guidance begins by making the obvious point that the selective use of arrest and conviction records may constitute disparate treatment discrimination in violation of Title VII. For example, an employer that disqualifies an African American based on a prior drug conviction, but is more lenient toward a white candidate with a similar criminal record, would likely be in violation of Title VII.

Less obviously, the guidance clarifies that a neutral policy or practice that has the effect of disproportionately screening out a protected group may violate Title VII under a disparate impact theory, if the employer cannot show that the policy or practice is job related for the position in question and consistent with business necessity.

Exclusions based solely on arrests may have a disparate impact, according to the EEOC, because African Americans and Hispanics are arrested in higher numbers than their representation in the general population. Further, such a policy will not satisfy the employer's defense, because an arrest does not establish that criminal conduct has occurred. As an example, the EEOC cites the hypothetical case of an African American employee who was arrested years earlier for disorderly conduct after complaining that he had been stopped for "driving while Black." Although no charges were filed against the employee, he is denied a promotion because his employer does not promote employees with arrest records. If the policy has a disparate impact on African Americans in practice, the EEOC would find reasonable cause to believe that the employer is in violation of Title VII.

An employer may use an arrest, however, to inquire into whether the conduct underlying the arrest justifies an adverse employment action. For example, if the arrest was for a serious offense, and the employer investigates and finds that the employee's explanation is not credible, adverse employment action against the employee may be appropriate, even if his trial has not yet occurred, or if he has been acquitted. Although the employee is presumed innocent in his criminal case, the employer need not apply

this presumption in making employment decisions.

An employer may treat a conviction as evidence that the employee engaged in criminal conduct. Nevertheless, the EEOC recommends as a "best practice" that employers not ask about convictions on job applications. The rationale for this recommendation is that an employer is more likely to fairly assess the relevance of an applicant's conviction once the employer is knowledgeable about the applicant's qualifications and experience.

If and when employers make inquiries about criminal convictions, the inquiries should be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity. To make this determination, the EEOC recommends that an employer either: (1) validate the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures; or (2) develop a "targeted screen" that considers the nature of the crime, the time elapsed, and the nature of the job, and then provides an opportunity for an individualized assessment for people excluded by the screen.

The EEOC's guidance concludes by listing examples of "best practices" for employers to use when they are considering using criminal records in making employment decisions. These "best practices" include:

General

- 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 prohibition on employment discrimination and how to implement policies and procedures consistent with Title VII

Developing a Policy

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct
- Determine the duration of exclusions for criminal conduct based on all available evidence
- Record the justification for the policy and procedures
- Note and keep a record of consultations and research considered in crafting the policy and procedures

Questions about Criminal Records

- 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

Confidentiality

- Keep information about applicants' and employees' criminal records confidential; only use it for the purpose for which it was intended

Employers would be well-advised to consult the EEOC's guidance, and only carefully and cautiously use arrest and conviction records as a basis for employment decisions.

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