
LEGAL ALERT

EEOC Issues New Guidance On Using Criminal Background Checks

On April 25, 2012, the EEOC voted 4-1 to adopt new guidance regarding employer use of criminal background checks to screen applicants and current employees. This guidance will affect nearly every employer in the country.

Based on a recent SHRM survey, over 90% of employers use criminal background checks for some applicants or employees and more than 70% of employers screen all their applicants or employees. Considering the EEOC's commitment to increasing the percentage of systemic discrimination (or class action) cases it brings over the next five years, you may want to revisit your criminal background check policy in light of the new guidance and ensure that your managers, hiring officials, and supervisors are properly trained to implement your policy.

What's Involved

The updated guidance provides the EEOC's roadmap for avoiding liability under Title VII based on a criminal background check policy. The guidance discusses both disparate-treatment and disparate-impact liability, but focuses on the disparate-impact theory. A disparate impact is where a neutral employment policy, such as a criminal background check policy applied to all applicants, disproportionately screens out applicants based on race or national origin and the employer does not demonstrate that the policy is job related for the positions in question and consistent with business necessity.

According to the EEOC, national criminal-history data demonstrates that criminal background check policies will have a disproportionate effect on racial minorities. The EEOC also makes it clear that even if your company has a racially balanced workforce, you may still be liable if your criminal background check policy has a disproportionate impact and you are unable to demonstrate that it is job related and consistent with business necessity.

Before implementing a criminal background check policy, or continuing to use your existing criminal background check policy, you should ask yourself the following questions.

Does our company treat all applicants with similar criminal histories equally?

As you know, Title VII protects persons from discrimination based on protected categories, which include race and national origin. If you have two applicants with similar criminal histories – for example a white and a black applicant with misdemeanor assault convictions within the past five years – they must be treated the same.



Have we attempted to validate our criminal background check policy?

One way to avoid liability under Title VII is to validate your criminal background check policy. To validate the policy, you will need to demonstrate to the EEOC that specific criminal history is related to subsequent job performance or behavior. Even though the EEOC lists validation as a defense to liability, note that validation studies are rare, and such studies may be difficult, if not impossible, to procure for your particular business.

Is our policy overly broad, or does it consider the appropriate factors?

The EEOC makes clear in its guidance that where the EEOC can demonstrate adverse impact, a policy excluding all applicants or employees with any criminal history violates Title VII. Instead of a blanket exclusion, consider 1) the nature and gravity of the offense or conduct; 2) the time that has passed since the offense or conduct; and 3) the nature of the job held or sought.

Does our policy allow for an individualized determination?

Even if your policy considers the appropriate factors above, your policy should provide the opportunity for an individualized assessment. Relevant factors, according to the EEOC, include: 1) evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal

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conduct; 2) rehabilitation efforts, e.g., education or training; and 3) employment or character references and other information regarding fitness for the particular position.

While the EEOC strongly recommends an individualized assessment, it is not necessarily required. But use caution when making individual determinations; this is an area where employers may be found liable under Title VII if applicants with similar mitigating factors are treated differently. It's best to prepare and follow a written policy to ensure consistency.

Are there less discriminatory alternative policies that achieve our goal?

Even where an employer successfully proves that the policy is job related and consistent with business necessity, if employees can demonstrate that another, less discriminatory, policy would allow the employer to achieve its stated goal or purpose, they will prevail. Refusal to adopt such an alternative policy may increase an employer's potential liability. It will be difficult to compare potential policies without validation studies, which the EEOC readily admits are rare at best. Nonetheless, you should regularly consider whether other equally effective options are available.

Is our policy supported by research and evidence?

An employer that deals with financial information may decide to exclude individuals with theft convictions over the past ten years from employment. The EEOC, and the courts, may no longer accept the seemingly obvious rationalization that applicants with theft convictions are more likely to steal.

Instead, you should be prepared to defend your policy with research, evidence, or statistics that demonstrate an increased likelihood that such applicants are more likely than applicants without a theft conviction to steal.

Are there federal or state laws or regulations that require us to prohibit applicants or employees with certain criminal histories?

The EEOC guidance makes it clear that an employer may point to a *federal* law or regulation to defend its policy. But exceeding the federal requirements may still lead to liability.

For instance, if the federal requirement is not to hire an individual with a theft conviction in the past ten years, but the employer excludes applicants with a theft conviction in the past twenty years, the employer may face liability if there is a disparate impact to applicants with theft convictions between 10 and 20 years prior to their application. Also, employers may not rely upon *state laws* or regulations as a defense to Title VII liability. The EEOC points out that Title VII preempts state law and therefore reliance upon state laws or regulations will not be a valid defense.

As you can tell, there are a number of factors that employers should consider before implementing a new, or continuing to use an existing, criminal background check policy. Our advice is that you document the rationale for your policy and be prepared to defend your choices to the EEOC.

For more information about this guidance or criminal background checks generally, contact your regular Fisher & Phillips attorney. Additionally, Fisher & Phillips attorneys will be conducting a free webinar to provide further information and guidance. We'll be sending additional information about dates and times in a subsequent email announcement. Look for an additional announcement on the webinar, or visit our website at www.laborlawyers.com for more information.

This Legal Alert provides an overview of a specific new federal guideline. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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