

## EEOC Propounds Guidance on Use of Arrest and Conviction Records in Employment Decisions

May 3, 2012

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On April 25, 2012, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued an enforcement guidance document titled [“Enforcement Guidance on the 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. § 2000e et. seq.”](#) (the “Guidance”), with respect to employers’ use of arrest and conviction information in connection with employment decisions.

### Disparate Treatment v. Disparate Impact

Although Title VII of the Civil Rights Act of 1964 (“Title VII”) does not prohibit employers’ use of criminal background checks, the Guidance reaffirms the EEOC’s longstanding position that employers may violate Title VII if they use criminal background information improperly. The Guidance, which updates and consolidates existing EEOC guidance documents on the subject that have previously been left unchanged since 1990, focuses on employment discrimination based on race and national origin.

According to the EEOC, there are two ways in which an employer’s use of criminal history information may violate Title VII. First, Title VII prohibits employers from engaging in “disparate treatment” discrimination – that is, treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin. Second, even where employers apply a criminal record exclusion under a neutral policy (e.g., uniformly excluding applicants based on certain criminal conduct), the exclusion may still operate to disproportionately and unjustifiably keep out people of a particular race or national origin. This is referred to as “disparate impact” discrimination. If the employer does not show that such an exclusion is “job related and consistent with business necessity” for the position in question, the exclusion is unlawful under Title VII.

### Arrests v. Convictions

In addition to providing examples of disparate treatment and disparate impact discrimination, the Guidance discusses the differences between arrest and conviction records. It explains that an arrest does not establish that criminal conduct occurred. Further, arrest records may not report the final disposition of the arrest (e.g., not prosecuted, convicted, or acquitted), may be inaccurate, or may continue to be reported even if expunged or sealed. Therefore, according to the Guidance, excluding an

applicant because of an arrest would not be lawful.<sup>1</sup> An employer, however, may make an employment decision based on *the conduct underlying the arrest* if the conduct makes the individual unfit for the position in question. For example, an elementary school may terminate the employment of its assistant principal when he or she is arrested for inappropriately touching young children if the school has a reasonable belief that the assistant principal actually engaged in the inappropriate behavior. In contrast, *a conviction record* will usually serve as sufficient evidence that a person actually engaged in particular conduct. Even so, the Guidance warns that employers should not make adverse employment decisions based on convictions alone – any such exclusionary policy must be “job related and consistent with business necessity.”

## Analyzing the Nature of the Conviction

There are two circumstances in which the EEOC believes employers may consistently meet this “job related and consistent with business necessity” defense: (a) where the employer validates the criminal conduct exclusion for the position in question in light of the EEOC’s Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about the criminal conduct as related to subsequent work performance or behaviors), and (b) where the employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job, before it decides whether to exclude the applicant or employee.

To assess whether an exclusion is job-related for the position in question and consistent with business necessity, the Guidance points to the factors set forth in the 1975 decision by the U.S. Court of Appeals for the Eighth Circuit in *Green v. Missouri Pacific Railroad*. The *Green* factors are: (a) the nature and gravity of the offense or conduct; (b) the time passed since the offense, conduct, and/or completion of the sentence; and (c) the nature of the job held or sought. Employers should weigh these factors and provide an individualized assessment for those individuals excluded by the screen to determine whether the policy, as applied, is job related and consistent with business necessity. (Keep in mind that New York employers are subject to similar rules pursuant to Article 23-A of New York’s Correction Law.<sup>2</sup>)

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<sup>1</sup> Significantly, New York law permits employers to make employment-related decisions based on “arrests pending adjudication” – i.e., those which have not yet been ruled upon. Most other jurisdictions do not make this distinction. Indeed, the Guidance does not address this distinction. Therefore, New York employers should be aware that they have greater latitude in connection with taking actions based on arrests pending adjudication

<sup>2</sup> Under New York’s Correction Law, [Article 23-A](#), Section 753, in connection with any employment-related decision based on a criminal history, employers must consider the following factors:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license or employment sought.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

## The Impact of Other Laws

The Guidance states that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provide a defense to a Title VII claim. Examples include rules pertaining to certain industries (in particular, the securities industry) or the federal government, jobs that require security clearances, and occupational licensure statutes and regulations.

Importantly, however, the Guidance also indicates that state and local laws or regulations are preempted by Title VII, and therefore would not provide such a defense if they “purport[] to require or permit the doing of any act which would be an unlawful employment practice” under Title VII.<sup>3</sup>

## What Employers Should Do Now

- Eliminate policies or practices that (a) exclude individuals from employment based on arrest records, or (b) contain blanket exclusions for any type of criminal record, without consideration of mitigating factors or job-relatedness.
- Train managers, hiring officials, human resource professionals (including recruiters), and decision makers about:
  - Title VII and its prohibition on employment discrimination, including both disparate treatment and disparate impact discrimination; and
  - How to utilize permissible factors to make non-discriminatory hiring, promotion, and other employment decisions.
- Develop a narrowly tailored policy and procedure for screening applicants and employees for criminal conduct; ensure that exclusions pursuant to the policy are job related and consistent with business necessity.
- Document any consultations and/or research that had been considered in compiling the policy and procedures.
- When convictions are identified, ensure that various factors – such as the nature or gravity of the offense, the time elapsed since the conviction or completion of the sentence, and the nature of the job or position sought – are carefully weighed and considered. Further to this point, make individualized assessments with respect to whether a conviction will affect the employee’s or applicant’s ability to perform the job in question.
- Keep information about applicants’ and employees’ criminal records confidential; only use it for the purpose for which it was intended.

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(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

<sup>3</sup> It should be noted that this may include a situation where a New York employer has taken an adverse employment action against an employee or applicant based on an arrest pending adjudication.

- Before utilizing a third party to obtain any background information on any employee or applicant, ensure compliance with the federal Fair Credit Reporting Act (“FCRA”) and any applicable state counterparts.

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For more information about this Advisory, any aspect of the Guidance, or compliance with the FCRA (or applicable state credit reporting laws), please contact:

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