



New EEOC Guidance on Employers' Use of Criminal Records

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The United States Equal Employment Opportunity Commission (EEOC) published new [guidance](#) on the use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964. The EEOC enforces Title VII, which prohibits employment discrimination based on, among other things, race and national origin.

The guidance replaces the EEOC's decades-old enforcement documents and takes effect immediately. The EEOC supports its position with statistical data reflecting higher arrest and incarceration rates based upon race and national origin.

An employer's use of criminal records can run afoul of Title VII in two ways: by disparate treatment or by disparate impact. For example, disparate treatment may occur when an employer treats two applicants or employees of different races or national origins with the same criminal record differently.

Disparate impact may be at issue if the employer applies a neutral criminal record policy and that application disproportionately impacts people of a certain race or national origin. The EEOC continues to emphasize that employment decisions based on criminal records must be job related and consistent with business necessity.

The guidance confirms the EEOC's position that an arrest, standing alone, generally never meets the "job related and consistent with business necessity" standard because an arrest does not establish that criminal conduct has occurred. But an employer may base an employment decision on the conduct underlying the arrest, if the conduct makes the individual unfit for the position in question.

With regard to conviction records, the EEOC takes the position that a conviction is reliable evidence that the underlying conduct occurred. The employer, however, then must be able to demonstrate that relying on the conviction in making an employment decision is job related and consistent with business necessity. In order to meet this standard, the EEOC offers employers two options: (1) statistically validate the criminal conduct or provide an analysis about the criminal conduct as related to subsequent work performance or behaviors (not a realistic option for most

employers); or (2) develop a targeted screening process which focuses on the nature and gravity of the offense or conduct, the time that has passed since the offense or conduct, and the nature of the job at issue, and then perform an individualized assessment before making the employment decision.

The guidance also provides that compliance with federal, state, or local restrictions on employment of individuals with criminal records may be a defense to a charge of discrimination; however, at the state and local level, the employer must still establish that its policy adopted to comply with state or local law is job related and consistent with business necessity.

The guidance offers best practice suggestions to employers, including: (1) train individuals involved in the hiring practice; and (2) “[e]liminate policies or practices that exclude people from employment based on any criminal record.” This second statement is troublesome for employers in many industries. The EEOC intends to use this guidance when investigating discrimination charges involving the use of criminal records in employment.

In recent practice, we have seen the EEOC inquire about use of criminal records in charges where such a factor is not at issue in the charge, so this is clearly an area of focus for the EEOC. In light of the EEOC’s new guidance and its continued focus on employer use of criminal records, employers should consult legal counsel before creating or refining a criminal record applicant screening process or making an employment decision about a candidate or current employee based on a criminal record.