



## EEOC Issues Guidance Addressing Employer Use of Criminal Background Checks

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Employers conduct background checks on current and prospective employees for many valid reasons. Background checks can be a useful tool for promoting productive business operations, weeding out workers who may threaten the workforce, preventing employee theft, protecting vulnerable business clients, and avoiding negligent hiring lawsuits. Under decades-old guidance, the U.S. Equal Employment Opportunity Commission's (EEOC) position is that employer reliance on criminal background information for employment decisions may have an unlawful adverse impact based on race.

On April 25, 2012, the EEOC issued Enforcement Guidance No. 915.002, which consolidates the EEOC's previous statements on this topic and provides more comprehensive direction. Importantly, the new guidance does not change the previous legal standard, *i.e.*, denial of employment based upon criminal background information must be "job-related" and "consistent with business necessity." According to the EEOC, an employer can make this showing if, in screening applicants for criminal conduct, it: (1) considers the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question; and (2) gives individual the opportunity to show why he or she should not be excluded. If the individual does not respond to the employer's attempt to gather additional information, the employer may make its employment decision without the information.

The recent guidance also stresses the importance of conducting an "individualized assessment" before denying an employment opportunity on the basis of a criminal record. Such an assessment involves consideration of: the facts and circumstances surrounding the offense or conduct; the number of offenses for which the individual was convicted; any 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 conduct; the length and consistency of employment history before and after the offense or conduct; rehabilitation efforts, including education or training; employment or character references and any information regarding fitness for the particular position; and, whether the individual is bonded under a federal, state, or local bonding program. An "individualized assessment" may be simple where the crime is closely related to the job, such as an applicant with an embezzlement conviction seeking employment as a bank cashier. Other cases may be more difficult.

The new guidance additionally distinguishes between reliance on arrest records, as opposed to conviction records, in reaching an employment decision. The new guidance states that an exclusion based on an arrest, in itself, is not job-related and consistent with business necessity. While an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest *if* the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes.

Notably, the new guidance does not represent a change in the law. The guidance is not legally binding, and courts may or may not consider it in adjudicating Title VII claims. Further, the EEOC does not have the authority to prohibit employers from using arrest or conviction records.

**Appropriate Use of Criminal Background Checks.** When using criminal background checks in reaching employment decisions, keep the following guidelines in mind:

- Avoid adopting a policy excluding all persons with criminal records from employment. Such a policy could violate Title VII because it does not consider whether a person's criminal history relates to a particular job or that exclusion of the person from employment is consistent with business necessity. Instead, develop policies and procedures designed to screen current and potential employees for criminal conduct in a manner relevant to the employer's business.
- Consider conducting "individualized assessments" before denying employment on the basis of a criminal record. While individualized assessments are not *required* under Title VII, they will aid you in defending against an EEOC investigation and/or a discrimination claim, if necessary.
- Conduct an independent investigation, if possible, when a current employee is arrested and/or convicted of a crime. The information gained allows an employer to make decisions based upon the underlying conduct and not solely on an employee's arrest/conviction. However, such an investigation may not be possible if the employee is concerned about self-incrimination and refuses to cooperate.
- Train hiring personnel, managers, and other decision-makers regarding appropriate use of criminal background information and Title VII's prohibition on employment discrimination.
- Maintain the confidentiality of current and prospective employees' criminal background information and use it only for the purposes for which it was intended.

If you would like additional assistance concerning the information addressed in this note, please contact Mark Busto or Laura Edwards at (425) 454-4233.

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