

The EEOC Issues New Enforcement Guidance for Use of Arrest and Conviction Records in Employment Decisions

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Practice Area: Labor and Employment

In April, the Equal Employment Opportunity Commission (EEOC) released its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*. Title VII does not expressly prohibit criminal background checks or conviction record discrimination. However, the EEOC does not favor policies if they have a statistically significant impact on certain racial groups without a clear business necessity. Wisconsin employers are also prohibited by the Wisconsin Fair Employment Act from discriminating based on criminal conviction records unless those records have a substantial relationship to the job.

The EEOC's Enforcement Guidance does not stray from the EEOC's prior position on criminal record discrimination and the "disparate impact" doctrine. Disparate impact discrimination occurs when an employment practice or policy has an unequal impact on a protected class of people. If an employment policy adversely impacts a certain racial group in a statistically significant way, that policy must be "job related and consistent with business necessity" or it will violate Title VII.

Even where an employer does not overtly discriminate against a particular race, if a criminal record screening policy disproportionately screens out applicants of a particular race or ethnicity, a case for race discrimination may be made. However, employers can defend themselves if they can show that the screened applicants' criminal records were related to the position in question. The EEOC maintains that blanket hiring and employment policies regarding individuals with arrest and conviction records are unacceptable. It reasons that because of national arrest and conviction rates for black and Hispanic males—which are 1 in 3 and 1 in 6, respectively, compared to 1 in 17 for white males—such blanket policies have a disparate impact on black and Hispanic individuals.

Can employers screen candidates based on criminal convictions? Yes, but employers should follow the following recommendations:

- Before excluding a candidate based on criminal conviction, make a business case for why the conviction is substantially related to the job in question.
- Consider the length of time that has passed since the crime was committed.
- Remember that arrests are not convictions. Find out the disposition or final outcome of an arrest. If there was no conviction, it is generally not advisable to discriminate based on that arrest, except under certain limited circumstances.
- Apply your policy consistently.
- Follow all applicable state law, such as the Wisconsin Fair Employment Act, which has express prohibitions on criminal record discrimination.
- Follow the Fair Credit Reporting Act if your business uses an outside vendor to conduct your criminal background checks.

Though the requirement for an individualized, job-specific assessment process is not new, the EEOC's Enforcement Guidance on this topic means it is likely to step up its enforcement activities regarding criminal background policies.

For these reasons, now may be a good time for employers to revisit and update their own hiring and employment practices to ensure they are consistent with the new EEOC Enforcement Guidance. Businesses should work with employment law counsel to make sure their practices comply with applicable law.

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