

# EEOC Issues New Guidance On Criminal Background Checks By Employers

Article By:

Michael B. Kass

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On April 25, 2012, the **Equal Employment Opportunity Commission issued new Guidance regarding employer use of criminal records under Title VII of the Civil Rights Act of 1964, as amended.**

The EEOC issued this Guidance primarily in response to two related issues: (1) employers' purported increased access to and use of criminal history information and (2) data showing that criminal record exclusions may have a significantly greater impact on minority applicants and employees.

## **Building on existing guidelines, the new Guidance specifically addresses the following issues (among others):**

- The EEOC's view that records of arrests and convictions must be evaluated differently. The EEOC advises that a blanket ban on hiring an individual based solely on his/her arrest record violates Title VII because an arrest does not establish criminal conduct occurred. By contrast, a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct. However, the Guidance makes clear the EEOC's belief that a policy which bars hiring applicants who have criminal convictions of any kind would also violate Title VII.
- It is unlawful for an employer to treat individuals with similar criminal records differently based on factors such as race or color.
- An employer may be in violation of Title VII if its neutral policy against hiring all individuals who have criminal arrests and/or convictions results in a disparate impact on employees or applicants of a particular race or national origin, unless the employer can demonstrate that its policy is "job-related and consistent with business necessity." The EEOC specifically discusses the significant negative impact which criminal background checks have on individuals of color.
- Whether and to what extent compliance with other federal laws and/or regulations that conflict with Title VII is a defense to a charge of discrimination involving a criminal background check.
- "Best practices" for employers when it comes to the use of criminal background checks.

Perhaps the most significant aspect of the new Guidance is the EEOC's position that although Title

VII does not require an “individualized assessment” of criminal history in all circumstances, the use of a criminal background screen that does not include such an assessment is more likely to violate the law.

The Guidance discusses two circumstances in which the EEOC believes employers will consistently satisfy the “job related and consistent with business necessity” defense when using criminal records to make employment decisions: (1) the employer validates the criminal conduct ban or exclusion for the position in light of the Uniform Guidelines on Employee Selection Procedures (which is likely an impossible burden for most employers to meet); or (2) the employer develops a “targeted screen” considering the nature of the crime, the time elapsed, and the nature of the job. The policy must also provide an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job-related and consistent with business necessity.

The Guidance also discusses the four factors used to determine whether an employer’s hiring and other employment decisions and policies relating to criminal background checks violate the law: (1) convictions as opposed to arrests; (2) nature and gravity of the offense or conduct; (3) time that has passed since the offense; and (4) the nature of the job held or sought. It also provides specific examples of criminal background policies which the EEOC believes violate Title VII.

### **The EEOC’s list of “best practices” for employers who consider criminal record information when making employment decisions include:**

- Eliminating policies and practices that exclude individuals from employment based on the mere existence of a criminal record;
- Developing a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct;
- Training managers and decisionmakers on how to implement hiring policies and procedures; and
- Limiting inquiries regarding an individual’s criminal background to situations in which such information is job-related for the position in question and consistent with business necessity as defined by the EEOC.

The Guidance provides detailed information concerning the agency’s views about the implementation of background check policies and procedures for hiring and other employment decisions.

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