

A yellow triangle pointing downwards, located to the left of the 'BLOGS' header.

BLOGS

Archives;Discrimination;Hiring & Firing

Criminal Background Policy Lands Pepsi in Hot Water

Earlier this month, Pepsi Beverage Co. entered into a conciliation agreement with the Equal Employment Opportunity Commission in which the company agreed to pay \$3.13 million and offer employment to 300 black applicants who were denied employment because of the company's background investigation policies. The case has received [media attention](#), but much of it appears to simply be a reminder of the pitfalls of requesting information about an applicant's arrest records. Pepsi's policy of inquiring into arrest records was ill advised, but it's worth noting that the practice of excluding applicants with convictions, even for minor offenses, was equally problematic in the EEOC's eyes.

Given our nation's arrest, conviction, and prison population [demographics](#) as compared with the general population, it is very clear that hiring policies which exclude applicants because of conviction records have the greatest impact on minority applicants. Excluding an applicant because of a previous conviction is lawful, but only if the employer can demonstrate that the prior conviction is job related and that the exclusion is consistent with business necessity. While discrimination issues stemming from criminal conviction status have not received much attention in the past, the EEOC's [E-RACE](#) (Eradicating Racism and Colorism from Employment) Initiative, now underway, is intended to bring them into focus. Pepsi is likely to be one of the first among many businesses that will face claims because of their hiring decisions involving ex-offender applicants.

So what constitutes a business necessity that allows an employer to exclude applicants on the basis of conviction records? According to the [EEOC](#), three factors determine whether an employer's decision was justified by business necessity:

- (1) The nature and gravity of the offense or offenses;
- (2) The time that has passed since the conviction and/or completion of the sentences; and
- (3) The nature of the job held or sought.

Employers who seek to exclude applicants based on conviction records should be able to articulate why the past offense(s) are relevant to the job and also should be able to point to an aspect of the job that presents a special risk of harm. As to the length of time that has passed since conviction/completion of sentence, a recent EEOC [staff opinion letter](#) suggested that the employer should not consider convictions more than 7 years old.

Given these developments, employers should review their policies and practices to make sure that their treatment of conviction records makes sense and complies with EEOC regulations.