

Health Law Alert: Do Your Hiring Policies Need a Spring Cleaning? The EEOC Has Issued New Guidance on Employers' Use of Criminal History in Employment Decisions

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The U.S. Equal Employment Opportunity Commission (EEOC) has issued new enforcement guidance on employers' use of arrest and conviction records in employment decisions. In light of this new guidance, employers that conduct criminal background checks on prospective employees should review their policies and practices to minimize the risk of discrimination claims.

The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin. The EEOC guidance does not create new law, but rather updates and clarifies guidelines issued over 20 years ago. The guidance explains that in order to avoid discrimination claims, employers should not deny employment simply because an applicant has been arrested and that employers should not deny employment because of a criminal conviction unless the exclusion of the employee is job related for the position in question and consistent with business necessity. Employers must consider all of the facts surrounding an applicant's criminal record and develop targeted screening processes. Failure to do so can be costly. Pepsi recently agreed to pay \$3.13 million to settle a case brought by the Minneapolis EEOC office related to Pepsi's former criminal background check policy.

Employers should note that this new guidance is not legally binding and courts can choose whether to defer to it in cases brought under Title VII. However, there is heightened EEOC scrutiny of employment decisions that discriminate on the basis of arrest or conviction records. Following the EEOC guidance will help employers reduce the risk of costly claims.

Disparate Treatment vs. Disparate Impact

The EEOC recognizes that employers have legitimate reasons to conduct background checks and inquire into an applicant's criminal history during the application process, such as preventing theft, fraud, or workplace violence, avoiding liability for negligent hiring, and protecting current employees. The EEOC's guidance does not prohibit the use of criminal history in the employment process, but rather addresses concerns for how the use of this data may be discriminatory. The EEOC discusses two theories in which

individuals can experience discrimination based on their criminal records: disparate treatment and disparate impact.

First, disparate treatment may result if an employer treats prospective employees differently on the basis of comparable criminal records. For example, if an African American applicant and White applicant have the same conviction on their respective records, but they are treated differently in the hiring process, there is disparate treatment. In order to establish that disparate treatment has occurred, the applicant must show that race, national origin, or another protected characteristic was used by the employer during the review of the applicant's criminal history in order to select that employee. The EEOC may look at inconsistencies in the hiring process, whether similar applicants were denied employment, or biased statements made by the employer.

Second, disparate impact discrimination may result if a policy or practice is neutral on its face but has an unintended disparate impact on individuals of a particular race or national origin. For example, African American and Hispanic men are arrested and convicted in numbers disproportionate to their representation in the population. Therefore, to have a blanket exclusion in an employers' policies prohibiting hiring based on a criminal conviction, would have a disproportionate impact on African American and Hispanic men. The guidance does not prohibit employers from obtaining and using criminal background reports about job applicants and employees. It does, however, require employers to show that the use of such reports is "job related and consistent with business necessity." An employer may demonstrate this by a consideration of the nature of the crime, the time elapsed since the criminal conduct occurred, the nature of the specific job in question, and allowing the applicant who is excluded by the screen the opportunity to show why she or he should not be excluded.

The Use of Arrests and Convictions

The EEOC's guidance distinguishes between an employer's use of arrest records and use of conviction records in employment decisions. The EEOC advises against using arrest records alone to deny employment because an arrest record is not evidence that the applicant actually engaged in criminal conduct. Some states have gone further and adopted laws that restrict employers from considering records of arrest that did not lead to conviction.

On the other hand, the EEOC considers conviction records to be reliable evidence that the underlying criminal conduct occurred, and therefore, employers may rely upon these records in limited circumstances where the exclusion is job related and consistent with business necessity. The EEOC notes that a policy excluding all individuals with criminal records likely would not be justifiable as "job related and consistent with business necessity," and thus could violate Title VII.



The EEOC's Proposed Best Practices

The guidance concludes with a number of best practices for employers, including:

- Employers should avoid questions about criminal history on employment applications.
- Employers develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct to ensure that such exclusions are job related and consistent with business necessity. Such policy or procedure should:
 - identify essential job requirements and the actual circumstances under which the jobs are performed;
 - determine the specific offenses that may demonstrate unfitness for performing such jobs and the time period during which offenses will be considered;
 - record the justification and research considered in crafting the policy and procedures.
 - include an individualized assessment, whereby the employer notifies an applicant that s/he may be excluded based upon a criminal conviction and provides the applicant an opportunity demonstrate why his or her criminal record should not result in exclusion from employment.
- Employers should train managers, hiring officials, and decision-makers on these hiring policies and procedures and Title VII's prohibition on employment discrimination.
- When asking questions of applicants about criminal records, employers should limit inquiries to records for which exclusions would be job related and consistent with business necessity.
- Keep information about applicants' and employees' criminal records confidential and only use such information for the purpose for which it was intended.

Other Action Employers Can Take

A few additional considerations for employers conducting background checks are:

- Ensure that your criminal background check procedures are consistent with the federal Fair Credit Reporting Act (FCRA) and applicable state laws.
- Ensure that contracted employee background check services comply with federal and state laws and that information received from these services is accurate; and
- Check state and local laws to determine the parameters for questioning applicants and how criminal history may be used in the hiring process.

For more information, the EEOC website has provided a question and answer page.

Employment Law Featured at Upcoming GPM Health Law Seminar

The Gray Plant Mooty Health Law team will be holding its annual Health Law Seminar on July 19th, at Earle Brown Heritage Center in Brooklyn Park. Employment law topics of interest to health care providers will be a featured topic at the seminar. Watch your email inbox for an invitation in the coming weeks. Meanwhile, if you have questions about the EEOC guidance, please contact Carl Lehmann (612.632.3234 or carl.lehmann@lathropgpm.com).



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