

Publications

Labor and Employment Alert: EEOC Issues New Guidance on Employers' Use of Arrest and Conviction Records

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On April 25, 2012, the U.S. Equal Employment Opportunity Commission released [enforcement guidance](#) on employers' use of arrest and conviction records in employment decisions in the context of Title VII of the Civil Rights Act of 1964, its first major statement on the subject in more than 20 years.

The guidance serves to reaffirm the Commission's longstanding policy that employers may not apply criminal record background checks differently for different groups of employees, and that arrest records are not proof of criminal conduct. In addition, the guidance identifies the Commission's new primary focus, which is the potential disparate impact as a result of using criminal records in employment decisions.

In the guidance, the Commission discussed its belief that even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin, resulting in disparate impact discrimination under Title VII. The Commission summarized that under this belief, employers may be liable for violations of Title VII even in the event they are promoting neutral policies.

In response to potential disparate impact claims, employers will be required to show that exclusions based on conviction records are "job related and consistent with business necessity" for the position in question. Within the guidance, the Commission analyzed the "job related and consistent with business necessity" standard, explaining that an employer may justify excluding employees by:

- Developing a narrowly tailored policy that considers, at least, the nature of the crime, the time elapsed and the nature of the job. Further, the employer's policy should provide an opportunity for an individualized assessment for those people identified by the initial screening, to determine if the policy, as applied, is job related and consistent with business necessity; or

- Validating the criminal background exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures. Specifically, the employer must show there is data or analysis about criminal conduct as related to subsequent work performance or behaviors.

In the enforcement guidance, the Commission also took the opportunity to suggest that employers implement what the Commission determined were "best practices" in regards to the use of criminal background inquiries. Among the suggestions were:

- Developing a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct;
- Identifying essential job requirements and the actual circumstances under which the jobs are performed;
- Determining the specific offenses that may demonstrate unfitness for performing such jobs;
- Not inquiring about arrest records;
- Training managers and decision makers to implement the employer's policy consistent with Title VII;
- Only inquiring into criminal backgrounds if the questions are job related and consistent with business necessity; and
- Potentially undertaking a case-by-case analysis of applicants who are identified in a criminal background screening.

In implementing best practices please note that, according to the guidance, employers who follow more stringent state or local laws will not be shielded from liability under Title VII.

The EEOC also released "[Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII.](#)" If you would like more information about the Commission's new guidance or would like to have a Vorys attorney examine your current criminal background policy, please contact your Vorys relationship attorney.