

EEOC Clarifies its Position on Criminal Background Checks

Employers Should Proceed with Caution

May 2, 2012

Employers who conduct criminal background checks or use criminal history information in employment decisions may run the risk of violating federal discrimination laws.

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) issued an updated Enforcement Guidance on employers' use of arrest or conviction records that both clarifies and expands the circumstances where a criminal background check policy or practice may run afoul of Title VII – creating greater risk of liability for employers.

The EEOC asserts that considering criminal history when making employment decisions could violate Title VII by disproportionately excluding members of a particular race or national origin from employment. The EEOC's Guidance relies upon nationwide data showing that African-Americans and Hispanics are arrested and convicted at a higher rate than the general population. The EEOC's concern is that the use of information obtained through a criminal background check may, in some circumstances, have a disparate impact on minority applicants. Accordingly, the EEOC has advised that criminal background screens must meet the standard of being "job related and consistent with business necessity." Employers have the burden of proving that the criminal background screen meets this standard. The new guidance sets out two circumstances where this standard is met: (1) the criminal conduct screen is validated under one of the three methods in the Uniform Guidelines on Employee Selection Procedures, found on the Department of Labor's website; or (2) the employer develops a policy or practice that is a "targeted screen" that considers at least the nature of the crime, time elapsed since the crime and the nature of the job for which the individual has applied.

The EEOC's updated Guidance deems it a best practice for employers to ensure that the targeted criminal background policy include a newly emphasized individualized assessment. An individualized assessment generally means that an employer informs the individual that she may be excluded because of past criminal conduct, provides an opportunity for the individual to demonstrate that the exclusion does not apply to her and considers whether the individual's additional information shows that the policy as applied to her is not "job related and consistent with business necessity."

The Guidance also identifies some examples of policies that are inherently not job related and therefore prohibited. These examples include a policy by which an employer excludes applicants based on an arrest without a conviction (although an employer may consider the underlying conduct if it makes the individual unfit for the position) or where employers have a blanket-policy that excludes anyone with a criminal record. The Guidance clarifies that an employer would not violate Title VII when complying with another federal law that requires excluding individuals. On the other hand, Title VII, as a federal law, will preempt any state or local law which may conflict with Title VII. Accordingly, complying with a conflicting state or local law is not a defense to a Title VII violation.

The Guidance also includes some suggested best practices for employers including training managers and decision-makers about Title VII's prohibition on employment discrimination and some helpful steps on developing a non-discriminatory criminal background check policy. The recommended steps include identifying essential job duties and the specific criminal offenses that may demonstrate unfitness for performing these duties; determining the appropriate time elapsed for the excluded criminal conduct; including an individual assessment; and keeping records on the research, development and justification regarding the policy and procedures.

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The Guidance and Q & A document can be found at www.eeoc.gov. Miller Canfield's Employment and Labor Group can also assist employers in auditing current criminal background check policies to ensure compliance with the more stringent guidelines.

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