

EEOC Guidance and Sample Policy

As you may be aware employment screening has been under the microscope for several years by the EEOC. Their concern is that the use of criminal conviction records and credit report information has a disparate impact on minorities within the working population. The claim is that these protected groups have higher rates of criminal convictions and/or poor credit such that the use of these hiring tools impacts them in such a way as to institutionalize and codify discrimination in our society. One could argue either side of the argument with a litany of facts, statistics and anecdotal data. Of that there is no doubt. There is a significant amount of doubt about how employers should balance the liability that is inherent in the employee‐employer relationship with the potential of government sanctions for what is considered basic due diligence ‐ a pre‐employment background check.

The EEOC is referencing [Title VII of the Civil Rights Act of 1964](http://www.eeoc.gov/laws/statutes/titlevii.cfm) when commenting on this issue. This act gave us the concept of "disparate treatment discrimination". Essentially, employers were told not to use criminal records differently where race, color, religion, sex or national origin might act as a factor in the hiring process. Employers were advised to not have policies that would have a disparate impact on those [protected classes. Title VII does not prohibit employers from running background checks but the Fair Credit Reporting Act and its state corollaries do provide a specific set of laws and regulations](http://www.ftc.gov/os/statutes/031224fcra.pdf) surrounding that process.

[The EEOC provided additional guidance for employer use of criminal background records. This 52 page Guidance document describes the circumstances under which an employer's use of arrest and](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) conviction records can violate Title VII's disparate treatment and disparate impact theories, provides hypothetical examples to underscore its legal analysis and concludes with a list of employer best practices. The EEOC does not appear to be imposing any new bright‐line rules explicitly designed to cut off employer's access to and use of certain information. Instead, the Commission continues to embrace the use of the long‐standing three‐factor test identified by the court in Green v. Missouri Pacific Railroad Company, when evaluating criminal history. The Green factors are:

1. the nature or gravity of the offense or conduct;
2. the time elapsed since the conviction and/or completion of the sentence; and
3. the nature of the job sought or held.

Employers who utilize criminal records information in the hiring process should design a background check policy that consistently refers back to those three factors and the Guidance attempts to provide a better understanding as to how the EEOC expects the factors to be applied.

The EEOC is also suggesting that employers have a validation study indicating how criminal conduct on the part of individuals impacts workplace performance. These studies are very rare and would presuppose that an expert witness would be able to testify to the validity of the study in both an academic and professional setting. Most employers will not have access to this type of information. That being the case, the concept of a "targeted screen" using the three criteria of nature of offense, age of the conviction and nature of the job would seem to be the best defense against a disparate impact claim.

The EEOC did not "ban the box", such as the prohibition imposed under Massachusetts' Criminal Offender Record Information law, but the EEOC recommends that employers refrain from asking about convictions in employment applications as a "best practice." It also advises that when employers do ask

applicants about their criminal history, that they only ask applicants who are applying to positions where criminal history may be relevant and that the questions be limited to those convictions that have a nexus to job duties.

The Guidance expressly states that an employer may not use an arrest record, by itself, to deny employment. This does not mean that an employer's hands are tied if it learns an employee has been arrested. The Guidance permits employment decisions based on the conduct underlying the arrest. Accordingly, an employee may be terminated for an arrest or an applicant denied employment ,so long as the conduct the employee or applicant was arrested for is relevant and makes the individual unfit for the position. For example, a school bus driver arrested for drunk driving. A validation study would assist in identifying and justifying these decisions when such a nexus is less obvious.

The new concept that was provided as part of this new guidance is that of the "Individualized Assessment". This is an interview in which the job applicant/employee is given an opportunity to provide an explanation for the adverse information and the employer considers extenuating circumstances before making a final decision. The EEOC went so far as to suggest several points that should be included in the assessment. They are as follows:

* Discuss the facts and circumstances surrounding the conviction
* The number of offenses included in the background check results
* The age of the applicant/employee at the time of the offense
* Evidence that the applicant/employee the same type of work since the conviction
* Length of employment since conviction
* Rehabilitation efforts
* Bonded by any government agency

The "take‐away" from this new "Individualized Assessment" is that the EEOC will not tolerate arbitrary or "bright line" hiring policies that exclude individuals without giving the applicant/employee an opportunity to provide some explanation. For some time now, it has been functionally illegal for employers to exclude all individuals with criminal records. This new assessment guidance is an indication that employers need not only have a background check policy that they can justify but that those applicants/employees who are being declined based on that information are given documented opportunity to provide an explanation for their criminal conviction. The EEOC states that employers who develop a targeted screen using the three Green factors and conduct an "individualized assessment" can avoid Title VII liability. According to a 2010 SHRM survey, 88 percent of respondents indicated that they allow candidates to explain the results of a criminal background check. Thus, it appears many employers already do a portion of this best practice.

The effect of this new Guidance advising individualized assessments is that it may put an end to organizations utilizing a "matrix" or grading system for criminal convictions, even if they outsource this process. They may find that they have to amend that process to include the individualized assessment or, perhaps, abandon that grading policy altogether.

Compliance with Federal and State Laws might be an altogether different issue. The Guidance makes clear that an employer who is conducting criminal background checks in order to comply with a federal law or regulation will not violate Title VII. However, if the scope of the screening exceeds the scope of the federally imposed restriction, the employer needs to be prepared to provide evidence (validation

study) justifying an enhanced policy. Unfortunately, the Guidance also makes clear that compliance with state and local laws will not shield employers from Title VII, because Title VII preempts state and local laws that are in conflict with it. While state laws may not pose a per se shield to a Title VII charge, compliance with state law may still constitute a business necessity. This new gray area will likely generate many more discussions and debates in the coming months. Developments as to the application of state laws should be followed as the Guidance is implemented.

**Suggested Actions**:

* Make sure your background check policy considers the nature of the offense, the time since the conviction or release, and the nature of the job in question.
* Consult with an employment law attorney about your policy so that the policy can be justified when a disparate impact claim is filed.
* Be aware of how your State laws interact with the EEOC's new Guidance and how your screening policy differs from the federally imposed law or regulation.
* Make sure that the process includes an individualized assessment with corresponding documentation.
* Train managers and anyone in the hiring process about Title VII and how to avoid discrimination and bias in hiring, and avoid policies that restrict hiring based on the criminal record alone.
* Use job descriptions to locate the essential functions of the occupation and create a clear connection to the conduct of the individual committing the criminal act that would make this applicant unfit for the position in question.

Subject: **Criminal History Records** Example of: Sample Policy

For each position in the company, the company has identified whether a criminal history check is required either by applicable law or is job related and consistent with business necessity. If a criminal history check is required, any applicant for the position, whether internal or external, will be requested to complete the criminal history record. In addition, the individual will be advised that confirmation will be sought from the appropriate authorities. If any consent form is required by an applicable law or a particular law enforcement agency to release the information, the applicant will be required to provide such a consent form. If any applicant declines to complete the criminal history record or to provide a required consent, such action will be treated as if the applicant has withdrawn his or her application for the position.

The company will take reasonable steps to obtain accurate information. If the criminal history provided by the applicant does not conform to the information obtained, the applicant will be given an opportunity to explain any differences. If a satisfactory explanation is not given, the applicant will not be considered further for the position.

Applicants will not be hired until the criminal history check has been completed.

If after employment any employee is discovered to have lied or omitted information regarding his or her criminal history, that individual is subject to immediate discharge.

Unless required by applicable law, the company will not inquire about arrest records. The company will inquire about probation, including deferred adjudication in accordance with applicable law.

The company’s equal employment opportunity policy will be followed with respect to any criminal history information. Accordingly, if an individual has a criminal history, the following factors will be considered in determining whether to hire the individual for the position sought:

* The nature of the criminal act
* The frequency of criminal acts
* The time since the last conviction
* The time between convictions
* The nature of the job
* The qualifications of the individual for the job
* Evidence the individual has successfully rehabilitated himself or herself

All criminal history record information shall be maintained in confidence in locked files separate from the personnel records.

This policy will be administered in accordance with any applicable equal employment opportunity laws as well as any other applicable laws.