

What You Should Know About the EEOC and Arrest and Conviction Records

Background: On April 25, 2012, the Commission, in a 4-1 bi-partisan vote, issued its [Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964](#), as amended, 42 U.S.C. § 2000e. The Guidance updates, consolidates, and supersedes the Commission's 1987 and 1990 policy statements on this issue, as well as the relevant discussion in the EEOC's Race and Color Discrimination Compliance Manual Chapter.

The Guidance is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

1) Does this Guidance prohibit employers from obtaining and using criminal background reports about job applicants or employees?

No. The EEOC does not have the authority to prohibit employers from obtaining or using arrest or conviction records. The EEOC simply seeks to ensure that such information is not used in a discriminatory way.

2) How could an employer use this information in a discriminatory way?

There are two ways in which an employer's use of criminal history information may be discriminatory. First, the relevant law, Title VII of the Civil Rights Act of 1964, prohibits employers from treating job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic (disparate treatment discrimination).

Second, the law also prohibits disparate impact discrimination. This means that, if criminal record exclusions operate to disproportionately exclude people of a particular race or national origin, the employer has to show that the exclusions are "job related and consistent with business necessity" under Title VII to avoid liability.

3) How would an employer prove "job related and consistent with business necessity"? Is it burdensome?

Proving that an exclusion is "job related and consistent with business necessity" is not burdensome. The employer can make this showing if, in screening applicants

for criminal conduct, it (1) considers at least the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question, and (2) gives an applicant who is excluded by the screen the opportunity to show why he should not be excluded.

4) Is the Guidance a new Commission policy?

No. The Guidance follows the text of the law about disparate treatment and disparate impact discrimination. Since at least 1969, the Commission has received, investigated, and resolved discrimination charges involving criminal records exclusions, and federal courts have analyzed the civil rights law as applied to criminal record exclusions since the 1970s. In addition, in 1987 and 1990, the EEOC issued three policy statements on this issue, and it also referenced the topic in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the EEOC's E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color discrimination in the workplace. Thus, applying Title VII to the use of criminal history information in employment decisions is well-established.

5) Why update this policy now?

In the twenty years since the Commission issued its three policy statements, there have been important legal and social changes. In 1991, Congress amended the Civil Rights Act to add Title VII disparate impact analysis, among other things. Since the 1990s, technology has made criminal history information much more accessible to employers. The number of working-aged individuals with criminal records in the population significantly increased during this period, especially in the African American and Hispanic communities.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pennsylvania Transportation Authority* decision that the Commission should provide more in-depth legal analysis and updated research on this issue. Therefore, in updating the Guidance, the Commission incorporated social science and criminological research, court decisions, and information about various state and federal laws to

help employers better assess the impact of using criminal records in employment decisions.

6) Did the Commission receive input from advocates, the business community and the public on this topic?

Yes. Representatives of employers, individuals with criminal records, and other federal agencies testified at public EEOC meetings in November 2008 and July 2011. The Commission also received and reviewed approximately 300 written comments from members of the general public and stakeholder groups that responded to topics discussed during the July 2011 meeting. The stakeholders that provided statements to express their interests and concerns include prominent organizations such as the NAACP, the U.S. Chamber of Commerce, the Society for Human Resource Management (SHRM), the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners' Project, among others.

Additionally, throughout the process of drafting the Guidance, individual Commissioners and staff met with representatives from various stakeholder groups to obtain more focused feedback on discrete and complex issues such as the U.S. Chamber of Commerce, SHRM, HR Policy Association, College and University Professional Association for Human Resources, the National Employment Law Project, and the Equal Employment Advisory Council.

More information about the EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, including [Questions and Answers about the Guidance](#), is available at www.eeoc.gov.