



For your information

Volume 35 | Issue 27 | May 11, 2012

## EEOC Updates Guidance on Employers' Use of Arrest and Conviction Records

The EEOC recently issued enforcement guidance, which consolidates and updates long-standing EEOC guidance under Title VII on employers' use of criminal records in making employment decisions.

### Background

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination by private employers as well as federal, state, and local governments on the basis of race, color, religion, sex, and national origin. Title VII prohibits both intentional employment discrimination (disparate treatment) and, in some cases, facially neutral employment policies or practices that disproportionately affect individuals in the protected classes (disparate impact). Employers may avoid disparate impact liability by demonstrating that the policy or practice is job related and consistent with business necessity.

The Equal Employment Opportunity Commission (EEOC), which enforces Title VII, has been concerned with employers' use of criminal history information for some time. As part of its [E-RACE](#) initiative, the EEOC linked employment decisions based on arrest and conviction records to workplace discrimination. Since the EEOC issued guidelines more than twenty years ago, the number of people with criminal records in the working-age population has increased significantly. According to the EEOC, criminal record exclusions may disparately impact African-American and Hispanic men because their arrest and incarceration rates are particularly high.

In the EEOC's first multi-million dollar settlement of 2012, Pepsi Beverages agreed to pay \$3.13 million and make major changes to its criminal background check policy to resolve charges of race discrimination. According to the [EEOC](#), Pepsi's policy disproportionately excluded black applicants from employment in violation of Title VII.

### EEOC Enforcement Guidance

On April 25, 2012, the EEOC voted 4-1 to approve updated [Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964](#) (Enforcement Guidance), which consolidates and updates previously issued guidance. The EEOC also issued [Questions and Answers](#) (Q&As) addressing the use of criminal records in employment screening for hiring or retention.

The Enforcement Guidance recognizes that employers are subject to federal laws and regulations prohibiting the employment, licensing, or security clearance of individuals with criminal records in certain circumstances. Unless required by federal law, a blanket policy or practice that excludes everyone with a criminal record from employment will not be considered by the EEOC to be job related or consistent with business necessity and thus will violate Title VII.

**COMPLIANCE ALERT:** Although Title VII does not regulate the acquisition of criminal history information, the federal Fair Credit Reporting Act establishes procedures employers must follow when they obtain criminal history information from third-party consumer reporting agencies.

The Enforcement Guidance notes two circumstances under which employers may consistently meet the job related and consistent with business necessity standards. Employers can statistically validate their use of criminal conviction information in employment decisions using the EEOC's [Uniform Guidelines on Employee Selection Procedures](#) standards. Alternatively, employers can conduct targeted screens with individualized assessments for those screened out because of criminal records. Targeted screens should take into account the following three factors: (1) the nature and gravity of the crime; (2) the time elapsed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought. The individualized assessment then allows screened out individuals to show why their past criminal conduct should not exclude them from the employer's further consideration.

**COMPLIANCE ALERT:** Because state and federal laws regarding the use of criminal background checks and arrest and conviction records may differ, employers should be mindful of what restrictions exist, where they apply, and how they may affect the hiring process.

Although neither Title VII nor the EEOC requires an individualized assessment in every case, the Q&As make clear that using a screen without an individualized assessment is more likely to violate Title VII. Even if the employer justifies a practice as job related and consistent with business necessity, the EEOC may still look to less discriminatory alternatives.

#### INSIGHT

**In view of the time and expense involved, conducting individualized assessments of applicants disqualified because of their criminal history may be especially cumbersome for large employers and employers with high turnover rates.**

Although compliance with federal laws and regulations that restrict or prohibit employing individuals with certain criminal records can provide a defense to a Title VII claim, compliance with state or local law may not shield an employer from Title VII liability. The Enforcement Guidance says that state and local laws or regulations are preempted by Title VII if they “purport[] to require or permit the doing of any act which would be an unlawful employment practice” under Title VII.

The Enforcement Guidance also distinguishes between arrest records and convictions, indicating that the use of arrest records generally is neither job related nor consistent with business necessity. However, in appropriate circumstances, the employer may base an employment decision on evidence of the individual’s conduct underlying an arrest if the conduct makes the individual unfit for the job. Although the Enforcement Guidance does not bar criminal background inquiries, the EEOC recommends that employers either not ask about criminal convictions on job applications or customize applications for particular jobs.

#### INSIGHT

**A number of states, cities and counties have removed the box on government job applications that requires candidates to disclose a criminal record. Hawaii and Massachusetts currently ban the box on applications for both public and private sector jobs.**

#### Conclusion

Although the new guidance is not binding on courts, it signals how the EEOC will investigate and pursue discrimination charges. The EEOC has made it clear that it generally favors narrowly tailored background check policies and views blanket no-hire policies for individuals with criminal records as discriminatory. In formulating policies on using arrest and conviction records, employers should consider the risk of discrimination claims against the potential for negligent hiring or retention claims.

#### Buck Can Help

- Evaluate the impact of the EEOC’s guidance on your hiring and employment practices
- Review and update employment practices, policies, and processes
- Institute best practices
- Train and educate managers and supervisors on Title VII and other antidiscrimination laws

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.  
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