

CRIMINAL BACKGROUND CHECKS: EMPLOYERS SHOULD EXERCISE SOME CAUTION

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In the wake of new guidance by the Equal Employment Opportunity Commission (www.eeoc.gov), employers may want to revisit their criteria for basing employment decisions on arrest and conviction records. A recent study revealed that as many as 92% of employers use criminal background checks in making hiring decisions for some or all of their employees. Of course, it would be important to screen out pedophiles from jobs working with children or to avoid hiring identity thieves as bank tellers. But statistics clearly show that applying arrest and conviction records too broadly tends to create a pattern of discrimination based on legally protected categories of race and national origin. For example, approximately one in seventeen white men will serve prison time at some point in their lives, but that rate rises to one in six Hispanic men and one in three African American men. There are also problems with the accuracy of some databases, and a record of an arrest does not reflect the ultimate disposition of the case.

The EEOC has prosecuted employers for applying policies that are neutral in the language used, but that are applied too broadly and create a pattern and practice of discrimination known as disparate impact. Obviously, disparate treatment will also result in liability based on violations of civil rights; that is, if an employer subjects one racial or ethnic group to a higher standard than other groups. But disparate impact cases are more subtle and complex.

The guidance, issued just over a month ago, suggests a more tailored inquiry and the use of background checks only where it can be shown to be job-related and consistent with business necessity.

Employers should consider three factors in making individual hiring decisions: (1) the nature and severity of the crime, (2) the time elapsed since conviction or release from incarceration, and (3) the nature of the job. A policy or practice to exclude everyone with a criminal record from employment will not meet the standard and will likely violate the civil rights laws. The Commission has identified two circumstances where employers will consistently meet the defense of being job-related and consistent with business necessity: First, where the employer validates the exclusion from a job in light of the Uniform Guidelines on Employee Selection Procedures based on data or analysis about criminal conduct as related to subsequent work performance or behaviors (See www.uniformguidelines.com); Second, where the employer develops a targeted screen considering the three factors listed above and then makes an individualized assessment, including the opportunity of the applicant to explain the circumstances of the offense. Employers should also be able to demonstrate that there are no less discriminatory alternative employment practices that would serve the employer's legitimate goals as effectively as the challenged practice.

Employers should also keep in mind that credit history checks have been prohibited for most employers in Oregon since July of 2010.

Good application forms will articulate that a prior criminal offense is not necessarily a bar to employment with the organization and will give the applicant the opportunity to explain the circumstances. In the final analysis, a transgression in a person's youth should not constitute a lifetime bar from employment. There is a bit of a tightrope for employers to walk here, identifying the fine line between guarding against a negligent hire and protecting applicants' civil rights.

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