

■ SPECIAL FEATURE

## Employers ignore new EEOC guidance at their peril

By **Brian D. Carlson**

The U.S. Equal Employment Opportunity Commission recently issued a formal “enforcement guidance” addressing the applicability of the chief federal employment discrimination statute, Title VII of the Civil Rights Act of 1964, to the use of criminal conviction and arrest records in employment decisions.

The guidance updates and supplements guidelines that the EEOC first issued on the subject more than 20 years ago.

In sum, the EEOC’s new enforcement guidance cautions that while, in some circumstances, employers may be justified in basing employment decisions on criminal background information, they should apply such policies in a flexible manner that allows for consideration of individual circumstances.

In the EEOC’s view, businesses that impose rigid prohibitions on employing persons with criminal records expose themselves to potential liability under Title VII.

While the enforcement guidance is not formally binding, courts often give serious consideration to the EEOC’s views in deciding

Title VII cases.

Further, the guidance highlights the types of criminal background policies that the EEOC is likely to view as “red flags” in investigating charges and deciding whether to initiate litigation.

Accordingly, employers ignore the new guidance at their peril.

### Conviction records

The guidance notes that, under court precedents and previous EEOC pronouncements, an employer’s use of criminal conviction records can potentially violate Title VII in two ways.

First, if an employer treats two individuals with similar conviction records differently — for instance, by offering employment to a white applicant with a larceny conviction, while declining to hire a Hispanic applicant with a similar conviction record — the employer may be found to have engaged in disparate treatment, in violation of Title VII. Alternatively, a facially neutral criminal history policy — for example, a policy excluding all individuals who have been convicted of any crime within the past 10 years — may result in an unlawful “disparate impact” upon members of protected groups.

In that regard, the enforcement guidance notes that members of certain minority groups are arrested and convicted of crimes in numbers disproportionate to their representation in the general population.

Where an employer’s criminal back-

ground policy results in such a disparate impact, it may violate Title VII, unless the employer can demonstrate that the policy is job-related and consistent with business necessity.

The guidance notes that the “business necessity” standard generally requires a two-part showing.

First, rather than simply excluding *all* applicants with criminal conviction records from consideration for a position, an employer should apply a “targeted screen” that is specifically tailored to (i) the nature of a conviction, (ii) the length of time that has passed since the conviction, and (iii) the nature of the job.

Second, if that targeted screen results in an applicant’s presumptive exclusion from employment, the employer should then engage in an “individual assessment.”

As part of the process, the applicant should be given an opportunity to demonstrate that he was not correctly identified in the conviction records, or that the records are otherwise inaccurate.

The employer should also consider any other relevant information provided by the individual, including:

- the specific circumstances surrounding the offense;
- the number of offenses for which the applicant was convicted;
- the individual’s age at the time of the conviction (or his release from prison);
- any evidence that, since the conviction, the



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applicant has held similar employment without engaging in further criminal conduct;

- the length and consistency of the individual's employment history before and after the criminal offense;
- the success of any rehabilitation efforts (such as education or training);
- employment or character references provided by the applicant;
- whether the individual is bonded under a federal, state or local bonding program; and
- any other available information regarding the applicant's fitness for the position.

According to the EEOC, it is only after evaluating any such information provided by the applicant that the employer may reject the individual on the basis of his criminal conviction history.

In the enforcement guidance, the EEOC acknowledges that there may be circumstances in which employers do not need to carry out such individual assessments.

For instance, various federal laws (such as banking and national security statutes) forbid employers from hiring applicants with convictions for certain offenses.

Similarly, it may *never* be appropriate for an individual convicted of a sexual offense to be hired for a position involving unsupervised contact with children, regardless of the length of time that has passed since the conviction.

However, such exceptions are fairly limited in scope.

## Arrest records

The guidance notes that, in contrast to a conviction, an arrest is not proof of criminal conduct. Thus, according to the agency, a policy that excludes individuals from employment solely on the basis of arrest records will not be found to be job-related and consistent with business necessity, as required to shield an employer from potential disparate-impact liability.

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However, it also notes that an employer may consider evidence bearing on the *conduct* underlying an arrest.

As an illustration, the guidance describes a scenario in which a school principal is arrested after being accused by a number of female students of having inappropriate physical contact with them and, in the

course of the school's investigation, gives an evasive and unsatisfactory account of his actions.

According to the EEOC, the school would not violate Title VII by terminating the principal in those circumstances — even before a conviction had been entered — because the school's action would be based on its findings as to the principal's conduct, and not the mere fact of his arrest.

## Recommendations for employers

In light of the guidance, employers should:

- review their criminal history policies and practices in consultation with counsel and, if appropriate, revise such policies and practices to ensure that applicants with criminal conviction records are given individualized consideration;
- ensure that all managers, supervisors and HR personnel receive appropriate training as to the use of criminal history information in employment decisions; and
- confirm that their criminal history policies and practices comply with all other applicable federal and state laws.

For instance, the federal Fair Credit Reporting Act imposes numerous obligations on employers that obtain criminal background information through consumer reporting agencies.

Similarly, numerous state laws limit the extent to which employers may ask applicants about their criminal history or base employment decisions on such matters.

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