

New Guidance issued by EEOC on Criminal Background Checks

In April, the Equal Employment Opportunity Commission (EEOC) issued new Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, pertaining to criminal background checks. The new Enforcement Guidance serves to consolidate and supersede the EEOC's 1987 and 1990 policy statements on the subject, as well as the discussion of arrests and convictions in the agency's Race & Color Discrimination Compliance Manual Chapter.

The Enforcement Guidance delineates the situations under which use of arrest and conviction records in hiring may violate Title VII of the Civil Rights Act of 1964 under a disparate treatment or disparate impact theory.

Disparate treatment discrimination occurs when protected classes are intentionally treated differently from other employees or are evaluated by different standards. An example might include an employer who automatically rejects Mexican-American applicants on the grounds that they might have a criminal record.

Disparate impact results when rules or practices applied to all employees have a different or more inhibiting effect on a protected class versus the impact on the majority. An example would be to impose a nonessential, across-the-board requirement of no criminal record convictions during the background check for certain jobs that impact minority groups, who have a disproportionately higher conviction rate than non-minorities. An example of disparate impact would be an organization that hires only workers with no conviction records for custodial positions, even if the conviction involved gambling, driving without a license or disorderly conduct.

In the case, *Green v. Missouri Pacific Railroad Company*, specific factors were established for employer use of conviction records when making employment decisions. The Enforcement Guidance continues to endorse these "Green factors" which include:

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

More specifically, the Enforcement Guidance provides two circumstances in which an employer's criminal conviction policy will "consistently meet" Title VII's "job-related" and "consistent with business necessity" defense. According to the EEOC, these circumstances include:

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1. employers who are able to validate their use of background screening policies and practices as a business necessity will meet the defense, or
2. develop a targeted screen using “Green factors,” and provide employees with criminal records an opportunity for an “individualized assessment.”

Other defenses for employers to consider involve compliance with federal or state laws that are specific to their business. For instance, the FDIC Act requires banks to conduct criminal background checks on applicants, and restricts their ability to hire individuals with certain conviction histories. Under these circumstances, this would be a valid defense for claim of discrimination brought by an applicant or employee under Title VII.

The guidance specifically points out the EEOC’s view that decisions based on the use of arrest records are not considered job related and consistent with business necessity. Employers, however, can base an employment decision on the underlying behavior or conduct that resulted in the arrest.

Best Practice tips for employers:

- Eliminate policies and practices that impose blanket prohibitions to employment based on any conviction
- Do not request arrest records from applicants
- Educate and train hiring managers and decision-makers about appropriate use of conviction history in hiring, promotion, and separation
- Revise screening procedures to ensure that they are job related and consistent with business necessity
- Do not ask applicants for disclosure of convictions that are not job related and consistent with business necessity
- Keep information confidential about applicants’ and employees’ conviction history

Employer Action Steps:

- Review background screening policies and practices in light of the new guidance, and;
- Make adjustments needed to the extent practices cannot be justified as job related and consistent with business necessity.
- Recruiters and job interviewers must be trained in connection with the EEOC’s Guidance in order to be credible witnesses in any challenge to the employer’s hiring, promotion, or separation decision-making.

*If you have questions, or need assistance with applying the EEOC’s Enforcement Guidance in your business, we’re here to help. Call Leon Singletary, President and CEO of First Contact HR at **267-419-1390**, or e-mail him at leon.singletary@firstcontacthr.com.*

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