



REGULATORY UPDATE

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EEOC Updates Arrest and Conviction Records Guidance

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) updated its guidance with respect to employers' use of arrest and convictions records when making employment decisions. The updated guidance incorporates the EEOC's prior policy statements and previous court decisions into new guidelines for employers.

These guidelines describe the appropriate use of arrest and conviction records by employers and specify the uses that will be deemed "discriminatory" under Title VII of the Civil Rights Act.

ARREST AND CONVICTION RECORD DISCRIMINATION UNDER TITLE VII

According to Title VII, employers may not discriminate against potential or current employees on the basis of race, sex, religion, color, or national origin. As an extension of racial discrimination, the EEOC has previously said that arrest and conviction records have been used in situations to racially discriminate against potential or current employees when making employment decisions. The EEOC guidance focuses on preventing employment discrimination based on race and national origin.

The EEOC guidance confirms that the selective use of arrest and conviction records – treating job applicants with the same criminal records differently because of their race or national origin – may constitute disparate treatment racial discrimination under Title VII. In addition, the guidance stresses that a neutral policy regarding the use of arrest and conviction records may also constitute disparate-impact discrimination if the policy eliminates a protected group during employment decisions.

The EEOC has stated that, when an employer is faced with a disparate-impact discrimination claim, the employer must show that the policy or practice is job-related and consistent with a business necessity. No employer may exclude a potential employee or applicant solely on the basis of an arrest and any conviction-based decisions must consider the nature of the crime, the length of time since the crime and the job requirements.

EEOC "BEST PRACTICES" FOR EMPLOYERS USING ARREST AND CONVICTION RECORDS

In addition to the guidance concerning the use of arrest and conviction records, and what constitutes discrimination in regard to their usage, the EEOC also provided employers with a "best practices" guide for when employers want to lawfully use arrest and conviction records to screen applicants.

These best practices are divided into specific categories, with each category corresponding to a particular issue an employer may have while using these records. The following are examples of best practices for employers who are considering criminal record information when making employment decisions:

- **General Guidance**
 - Eliminate policies or practices that exclude people from employment based on any criminal record; and
 - Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination.

EEOC Updates Age Discrimination Guidelines for Employers

- **Developing a Policy**

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct;
- Identify essential job requirements and the actual circumstances under which the jobs are performed;
- Determine the specific offenses that may demonstrate unfitness for performing such jobs;
- Identify the criminal offenses based on all available evidence;
- Determine the duration of exclusions for criminal conduct based on all available evidence;
- Include an individualized assessment;
- Record the justification for the policy and the procedures;
- Note and keep a record of consultations and research considered in crafting the policy and procedures; and
- Train managers, hiring officials and decision makers on how to implement the policy and procedures consistent with Title VII.

- **Questions about Criminal Records**

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

- **Confidentiality**

- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

MORE INFORMATION

For more information regarding this EEOC guidance update, please see the [EEOC press release](#) regarding the updated guidance on the employer use of arrest and conviction records. For a copy of the enforcement guidance, see www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

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