

5 Things You Should Consider to Comply with the EEOC Guidance on Background Checks



On April 25th, 2012 the U.S. Equal Employment Opportunity Commission (EEOC), the agency that enforces federal laws prohibiting employment discrimination, 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. “The new guidance clarifies and updates the EEOC’s longstanding policy concerning the use of arrest and conviction records in employment, which will assist job seekers, employees, employers, and many other agency stakeholders,” EEOC Chair Jacqueline A. Berrien stated in a press release on the EEOC website. Amongst other things, the updated guidance from the EEOC recommends, for employers considering criminal record information when making employment decisions, and wanting to maintain the “job related and consistent with business necessity” defense for discrimination claims, to either:

- “...validate the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures...” (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job. The employer’s policy then provides an opportunity for an individualized assessment for those people

identified by the screen, to determine if the policy as applied is job related and consistent with business necessity.

So what can you the employer do? Here are 5 things for you to consider.

1. Prepare for a Validation Study

A validation study generates evidence that the pre-employment tests you are using are good predictors of future job performance. When a testing program has been “validated” you have documented assurance that the information used to make hiring decisions is predictive of future job performance and is, thus, fair to job candidates. Typically, a validation study includes a job analysis; a rationale for tests (in this case background checks) used; information on how employees or job candidates perform on the tests (background checks); and, a demonstrated relationship between tests scores (background check outcomes) and some measure(s) of success on the job – usually supervisor ratings or other objective measures.

2. Create a Targeted Screening Program

Generally, the EEOC recommends eliminating policies or practices that exclude people from employment based on any criminal record. Train managers, hiring officials, and decision makers about Title VII and its prohibitions on employment discrimination. Employers should consider developing a narrowly tailored written

policy and procedures for screening criminal records; identify essential job requirements and the actual circumstances under which the jobs are performed; determine specific offenses that may demonstrate unfitness for performing such jobs; identify criminal offenses on all available evidence; and, determine the duration of exclusions for criminal conduct based on all available evidence. Most importantly though, record the justification for the policy and procedures!

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3. Incorporate an Individualized Assessment Process

To determine if your screening policy as applied is job related and consistent with business necessity, the EEOC recommends an individualized assessment for those candidates that you would exclude because of a criminal record on their background check report. Although Title VII does not require individualized assessment in all circumstances, the EEOC states that the use of a screen that does not include individualized assessment is more likely to violate Title VII. In layman's terms, an individualized assessment requires you, the employer, to meet (interview) with any candidate and determine:

1. the facts or circumstances surrounding the offense or conduct;
2. the number of offenses for which the individual was convicted;
3. older age at the time of conviction, or release from prison;
4. evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
5. the length and consistency of employment history before and after the offense or conduct;
6. rehabilitation efforts, e.g., education/training;

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7. employment or character references and any other information regarding fitness for the particular position; and,
8. whether the individual is bonded under a federal, state, or local bonding program.

Once you have obtained the above information, determine whether or not the conviction is job related and prohibits eligibility for employment because of a business necessity. Common business necessities may include, but are not limited to, things like safety, rule following, impulsiveness, orderliness, etc.

4. Modify Your Screening Workflow

Another option to consider is when and where you use background checks in your recruiting, hiring, and screening process. Some employers use background checks at the front of their hiring process, subjecting any and all applicants to their screening program. In light of the current EEOC guidelines, this process may become cumbersome, or impossible for hiring managers. Companies using background checks at the front of their recruiting process will likely consider integrating the Individualized Assessment process mentioned above to ensure compliance with EEOC standards. Instituting the Individualized Assessment process for a company that conducts background checks on all applicants, however, will create a tremendous administrative burden on HR and Hiring Manager alike. HR will need to ensure that hiring managers are 1) trained and familiar with the individualized assessment process; and, 2) performing the individualized assessment process in a uniform and consistent manner. For companies with large applicant flow and decentralized hiring structures, this will become extremely difficult. These companies may need to consider modifying their screening workflow to only background check a short list of applicants instead of all the applicants.

5. Incorporate a New Screen-Out Strategy

Companies looking to reduce their exposure to EEOC liabilities for discriminatory practices in conjunction with the use of arrest and criminal background reports may want to consider incorporating a new screen-out strategy. A screen out process or strategy is a predefined set of questions or tools that eliminates candidates to reveal a short list of applicants. There are several alternative screen-out tools for employers to consider besides criminal and arrest record information. First, consider incorporating a nonscientific screening program. A nonscientific screening program usually exists as functionality that is built into an ATS or

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candidate management system. This type of screening helps you identify the right candidate to the right place and to install basic tactics to reduce resume overload, based on simple but critical information such as, "Does the candidate have proof of citizenship" or "Does the candidate have reliable transportation?" If you do not presently have screening of any kind built into your online hiring process, you may want to consider adding this type of screening first. This basic capability should really help to improve your online hiring process.

Second, consider using a scientific screening tool at the front of your application process. Many companies already use assessments to determine potential and performance of some or all candidates. Interestingly, the use of assessments is more developed in European Union countries because background checks in the European Union are subject to numerous restrictions and stringent data privacy laws. Maybe Europe has something here? Probably the most significant benefit to incorporating assessments as a screen out tool is that there is already a tried-and-true baseline to the validation of their credibility and defensibility for discriminatory practices. Submitting for a validation study for assessment appears to be a much safer bet, since the EEOC has stated in their guidance that background check validation "studies are rare at the time of this drafting."

records. Lastly, training staff involved in interviewing and hiring steps around the Individualized Assessment process and best practices suggested by the Guidance. Not only will the EEOC, but plaintiff attorneys alike, are expected to pursue charges under this new paradigm.

Summary

The EEOC Guidance summarizes the EEOC's long-held position that employers' reliance on arrest and conviction records may have a disparate impact on individuals because of their race or national origin. Although not legally binding, the Guidance provides key insight into how the EEOC views the use of criminal records when screening applicants. With no new bright line rules to extinguish employers access to and use of arrest and criminal records and hundreds of pending investigations on the subject, the Guidance should serve notice to employers that they must be prepared. Employers may want to consider taking steps such as, reviewing background check policies, screening practices, and general use of arrest and criminal



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