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Best Practices for Employers Considering Criminal Records for Hiring

The Equal Opportunity Employment Commission (EEOC) published an enforcement guidance in 2012, which provides best practices for employers considering arrest and conviction records in employment decisions. This document provides an overview of EEOC's best practices for employers to assist in your development of a hiring program tailored to your business needs.

1.

Develop a Policy for the Consideration of Criminal Records in Employment Decisions

Employers may be liable for violating Title VII where an otherwise neutral hiring policy or practice has the effect of disproportionately screening out specific groups of individuals, and the employer fails to demonstrate that their policy or practice is job related for the position in question and consistent with business necessity. When considering criminal records as part of an employment screening practice, employers should:

- Eliminate policies or practices that categorically or automatically exclude people from employment in any job based on any criminal record.
- Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination.
- Limit questions about criminal records to those which exclusion would be job related for the position and consistent with business necessity. Questions of this nature should also be deferred until later in the application process.
- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.
- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct which include:
 - » Identification of essential job duties & requirements;
 - » Determination the specific offenses that may demonstrate unfitness for performing such duties;
 - » Determination the duration of exclusions for criminal conduct based on all available evidence;
 - » Inclusion of an individualized assessment procedure (see below);
 - » Documentation of the justification for the policy and procedures.
- Document consultations and research considered in crafting the criminal record consideration policy and procedures, and train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.

2.

Be Careful When Using Criminal History Information in Employment Decisions

Any background information you receive from any source must not be used to discriminate in violation of federal law. This means that when evaluating background reports which include criminal history, you should:

- **Apply the same standards to everyone**, regardless of their race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older).
- **Acknowledge and account for potential disparate impact.** Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion; among people who have a disability; or among people age 40 or older. A policy or practice that disproportionately affects one of these groups and is not job related nor consistent with business necessity may violate Title VII.

- **Be prepared to make exceptions.**

You should allow applicants to demonstrate their ability to do the job – despite otherwise disqualifying information on their background report. Unless allowing an exception would cause significant financial or operational difficulty, or where there is a demonstrably tight nexus between the applicant’s criminal history and job duties, applicants should be given the opportunity to demonstrate their fitness for the job (See individualized Assessment below).

3.

Conduct an Individualized Assessment of Criminal History

Individualized assessment generally means allowing applicants to make a case for themselves after criminal history has been identified as potentially disqualifying for the job. The process includes:

- **Informing** the individual that he or she may be excluded from employment because of past criminal conduct;

- **Providing** an opportunity to the individual to demonstrate that the exclusion does not apply to him/her; and
- **Considering** whether the individual's additional information shows that the policy as applied is not job related nor consistent with business necessity

Employers should provide the applicant with an opportunity to present their case, and then individually consider mitigating circumstances that are not included in the original background check, such as:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Age at the time of conviction, or release from prison;
- 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;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;

- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

Any information provided by an applicant that consists of rehabilitation efforts that demonstrates personal growth or self-improvement can be considered evidence of rehabilitation. In addition to reviewing a background check, such evidence of rehabilitation may provide more insight into the eligibility of the applicant.

No individualized assessment is needed when there is a “demonstrably tight nexus” between the job duties and responsibilities and the offense or conduct. Such a nexus will be present only in limited circumstances (for example, a recently convicted sexual predator to work supervising children at a day care, or an applicant with recent convictions for identity theft to work in a position handling sensitive personal financial information like Social Security and credit card numbers).

If the individual does not respond to the employer's attempt to gather additional information about his or her

background, the employer may make its employment decision without the information.

See sample individualized assessment worksheet included in this publication.

4.

Follow Local “Ban the Box” and Other Laws

Following EEOC best practices can help mitigate Title VII risk, but employers also must look to state and local laws that govern hiring and personnel decisions. State “Ban the Box” laws prohibit employers from inquiring into an applicant’s criminal record before a job interview, or in some places, before a conditional job offer has been given.

For example, some employers ask about an individual’s criminal history on the employment application itself. However, the trend in the law is to prohibit this practice, so you should consult independent counsel before asking about an individual’s criminal history.

References

EEOC Enforcement Guidance (2012), *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*. Available at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Federal Trade Commission Guidance (2014), *Background Checks: What Employers Need to Know*. Available at <https://www.ftc.gov/tips-advice/business-center/guidance/background-checks-what-employers-need-know>

Sample Individualized Assessment Worksheet for Criminal History

Factors Considered	Specific Question(s)	Notes
Nature and Gravity of Offense	Misdemeanor? Felony? Plea/Conviction?	
Age of Offense	How many years ago did the offense occur?	
Number of Offenses	How many offenses?	
Facts/Circumstances Surrounding Offense	What happened?	
Age At Time Of Conviction(s)/Plea(s)	DOB?	
Work History Pre-Conviction/Plea	Similar job?	
Work History Post-Conviction/Plea	Similar job?	
Rehabilitation Efforts (e.g., Education/Training)		
Employment/Character References Provided?		
Is Applicant Bonded?		

**Attach any supporting documentation provided by applicant. Retain in designated HR file.