



*Summary of the EEOC Guidance
Regarding the Use of Criminal History
Checks in the Selection Process*

Prepared by:

Jim Kuthy, Ph.D.

Heather J. Patchell, M.A.

Employers commonly use criminal history checks as one of their steps in a selection process. The Equal Employment Opportunity Commission (EEOC) has pointed out that such checks can sometimes violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, especially in the areas of race and national origin.

With that in mind, the EEOC has updated its policy regarding the use of criminal history information. *That being said, the current update seems to be in keeping with previous EEOC policies in this area.* Namely, if an employer uses a criminal history check and Adverse Impact is found in this step of the selection process, the employer must justify a “business necessity” defense that includes (at least) three components.

1. The nature and gravity of the offense or conduct;
2. The time that has passed since the offense or conduct and/or completion of the sentence; and
3. The nature of the job held or sought.

However, the updated policy *differs* from previous policies by expanding the EEOC’s discussion of disparate treatment analysis and by providing examples of how applicants have been unfairly treated in the past based on their criminal history. There are two ways in which an applicant can be treated unfairly.

1. An employer can treat criminal history information for different applicants differently. This is especially problematic when race or national origin plays a role in the different treatment.
2. An employer’s neutral process, such as excluding all applicants who have a criminal conviction, can trigger Title VII if such a process disproportionately impacts persons protected under Title VII. Such a disproportionate impact can violate Title VII if the application of the criminal history information is not job related and consistent with business necessity.

The EEOC also provides several advisements that those employers who wish to use criminal history checks should keep in mind.

1. An arrest does not establish that criminal conduct has occurred. However, an arrest might trigger an inquiry into whether the conduct that led to the arrest justifies an adverse employment action.
2. Convictions usually serve as sufficient evidence that an applicant engaged in criminal conduct. However, since there may be errors in the record or the status of the conviction may have changed (e.g., successfully appealed, expunged).

In the Enforcement Guidance web page, the EEOC reminded us about the Green v. Missouri Pacific Railroad (1975) decision, which identified three factors employers should take into consideration when determining whether a criminal history check is job related and consistent with business necessity.



1. The nature and gravity of the offense or conduct,
2. The time that has passed since the offense or conduct and/or completion of the sentence, and
3. The nature of the job held or sought.

Two circumstances in which the EEOC believes employers will consistently meet the “job related and consistent with business necessity” defense are as follows:

1. The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); or,
2. The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three Green factors cited above), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

Interestingly, the recent announcement by the EEOC appears to signal a change from how discrimination investigations were conducted in the past. Specifically, it appears that the EEOC will potentially investigate the use of criminal history checks by employers without any claims of adverse impact for any specific employer or even a specific industry. While this appears to be innocuous and will likely protect against the misuse of such checks, it also appears to set a precedent that is fraught with potential difficulties. The question arises, what is the next selection processes the has been shown to have disparate impact in general, that the EEOC will investigate, even if there is no claim of disparate impact by an injured party? This should cause those who are familiar with the consistent finding of adverse impact when using cognitive ability testing to pause. Apparently, the trend by the EEOC is that plaintiffs will no longer need to point out possible shortfalls. Instead, the EEOC appears to have taken on the right to proactively investigate employers merely because they use a specific type of selection device.

In summary, the EEOC did a good job in writing up this policy. It is clear, understandable, and most importantly, solidly grounded on Title VII’s history on this matter. The EEOC provides employers with examples of cases where discrimination occurred as well as some best practice guidelines. However, there are some subtleties of the policy, as previously mentioned, that may warrant further exploration of the move as a whole.

We urge those employers that either use or are considering using criminal history checks as part of their selection process to review the full EEOC Enforcement Guidance on this issue at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#V. They should also review the EEOC’s Questions and Answers document about their enforcement of criminal history checks at http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.



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Contact Information

Biddle Consulting Group
193 Blue Ravine Road, Suite 270
Folsom, CA

(800) 999-0438

staff@Biddle.com

www.Biddle.com

