



New EEOC Guidance Regarding the Use of Criminal Records

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On April 25, 2012, the Equal Employment Opportunity Commission ("EEOC" or the "Commission") approved new guidelines regarding the use of criminal records in employment-related decisions. This comes on the heels of increasing access to criminal records, and the corresponding use of this information by employers in employment-related decisions. The guidelines recognize that an employer's consideration of an individual's criminal history in employment-related decisions may violate Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII prohibits employment discrimination only on the basis of race, religion, sex, and national origin. The possession of a criminal record is not an expressly protected characteristic under Title VII; however, the consideration of criminal records in employment-related decisions runs afoul of Title VII when it is used to support the disparate treatment of applicants or employees on the basis of a protected characteristic, or when it has a disparate impact on members of a protected class and is not supported by business necessity. This is not a new position, but the guidance provides greater detail regarding these claims and associated defenses.

An employer engages in disparate treatment when the employer's consideration of either an applicant or an employee's criminal record is affected by the individual's race, national origin or some other protected characteristic. This includes not only decisions driven by sheer racial animus, but also decisions influenced by racial and ethnic stereotypes involving criminality. When determining if an employer has engaged in disparate treatment, the EEOC considers a variety of factors including biased statements, inconsistencies in the hiring process, similarly situated comparators, employment testing, and statistical evidence. For a more detailed explanation of each of these factors, please see the EEOC guidance [here](#).

In contrast, disparate impact occurs when an employer's *neutral* criminal record policy disproportionately affects members of a protected class, and the policy is not job related and consistent with business necessity. As African Americans and Hispanics have significantly higher conviction and arrest rates when compared to the general population, most employment decisions based on criminal records will have a disparate impact on these groups. An employer can rebut this presumption with evidence that the employer's criminal record policy does not have a disparate impact on protected groups. Examples of such evidence are data indicating that African American and Hispanic men are not arrested and/or convicted at higher rates in the employer's region, and the employer's applicant data. Evidence of a racially balanced workforce, without more, is insufficient to disprove disparate impact.

Moreover, a facially neutral criminal records policy with a disparate impact is not discriminatory, if the practice is related to the position at issue and supported by business necessity. Notably, employment decisions based only on an arrest record are never protected by business necessity. However, employment decisions based on the conduct leading to the arrest are protected by business necessity, if such conduct affects the individual's ability to perform the job at issue.

Unlike arrest records, an employer's consideration of criminal convictions in employment-related decision can be defended under business necessity. The guidance provides two situations where an employer's criminal records policy will consistently meet this threshold: reliance on uniform guidelines, and the use of targeted screens and individualized assessments. First, an employer can validate its criminal conduct screen for a position with the Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines") standards. Alternatively, or in the absence of Uniform Guidelines, employers can develop a targeted screen that incorporates factors such as the nature of the crime, the time elapsed and the nature of the job ("Green factors"), and provide individuals excluded from the screen with an opportunity for individualized assessment. The individual assessment provides the screened out applicant with notice and the opportunity to demonstrate that the exclusion should not be applied to the applicant given his or her circumstances. It also allows the employer to reconsider the applicant, in light of the additional information, to determine if the criminal conduct exclusion as applied to the applicant remains job-related and consistent with business necessity. Significantly, the Commission notes that criminal conduct screens that rely exclusively on the Green factors can meet this threshold. However, individual assessments provide employers with an additional defense to Title VII actions.

Compliance with federal laws and regulations is also a defense to the charge that an employer's consideration of criminal records is discriminatory. However, to the extent that an employer's policy exceeds the scope of the federal law or regulation, it is subject to the Title VII analysis. In contrast, compliance with state and local regulations is not a defense. When complying with state and local regulations, employees must ensure that their consideration of the criminal records is job related and consistent with business necessity.

These new regulations supersede prior decisions by both the Commission and the court, and are effectively immediately. Therefore, employers should become familiar with this guidance as they develop and revise their criminal records policies.

For more information about this topic, please contact the authors or any member of the Williams Mullen Labor & Employment Team.

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