

Highlights of EEOC's New Criminal Record Guidance April 26, 2012

In bi-partisan fashion (by a vote of 4 to 1), the U.S. Equal Employment Opportunity Commission (EEOC) issued a revised guidance on the application of Title VII to criminal records on April 25, 2012. The new guidance, which supersedes the original version issued in 1987, can be found at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

The thorough review and analysis by the EEOC confirms the core principles present in the earlier guidances, including:

- The presumption that criminal record policies have a disparate impact based on race and national origin, for purposes of EEOC investigation of criminal record charges (page 10);
- The three “business necessity” factors (age of the offense, seriousness of the offense, and the relationship to the job) contained in the EEOC’s 1987 convictions policy (page 15);
- The conclusion that across-the-board exclusions usually violate Title VII (page 16); and
- The prohibition against considering arrests that have not led to convictions (page 12).

Indeed, the new guidance in many respects simply updates and clarifies prior law and policy.

Nevertheless, the new guidance is enormously important, for both employers and workers because it updates and clarifies the EEOC standards. The following five features are the most notable changes.

1. ***The policy provides more direction and information to the public.***
 - a) It provides numerous illustrative ***examples***. Employers and workers will better understand what common practices might violate the law. For instance, the following scenarios are described as potentially violating Title VII:

- Firing existing employees with no performance or safety issues because a new employer taking over a business learns of a record when conducting background checks of the workforce (Example 8) (page 20).
- On line applications that kick people out when they indicate that they have a criminal record (Example 5) (page 16).

Whereas the following scenario is likely not a violation of Title VII:

- Firing an existing employee based on an investigation of allegations of job-related misconduct that led to a pending case, and the firing is based on the underlying conduct, not the fact of the arrest (Example 4) (page 13).
- b) It identifies *best practices* that employers can pursue (pages 25-26).
 - c) It pulls together the *social science and legal research* for the general public (and satisfies the stated desire for a better supported policy by the court in El v. SEPTA, 479 F.3d 232 (3d Cir. 2007)) (see lengthy endnotes from pages 27-52) and includes helpful background information (pages 4-6).
2. ***Unlike the old policy, the new policy provides guidance on how employer criminal record policies should be designed to comply with Title VII.*** See especially Example 7 on pages 18-19.
 - a) It points employers to the relatively new social science research on “desistance,” so that they have assistance in designing their policies.
 - b) It emphasizes that employers should distinguish between different jobs and different offenses and provide time limits for disqualifications.
 - c) It recommends that employers consider individual circumstances.
 3. ***The policy looks in depth at how an applicant’s individual circumstances should be considered, in addition to the three business necessity factors described above.***
 - a) It identifies the *factors* that ought to be considered (page 18). Examples are employment history, rehabilitation, and older age at the time of conviction. These factors are also supported by social science research, and most are not addressed in the prior guidance. This list should be helpful for both employers and workers.

- b) It also recommends the *process* by which these individual circumstances should be considered. The three steps are: (1) employer notification to the applicant that he may be rejected based on his criminal record; (2) an opportunity for an applicant to respond; (3) employer consideration of what the applicant has said in his own behalf (page 18).
4. ***The policy endorses as a best practice the fair hiring process adopted in many states and cities, which removes the criminal background check from the job application and delays the inquiry until later in the hiring process*** (pages 13-14). Indeed, postponing the background check should limit the number of candidates for whom individualized assessments are needed.
5. ***The policy explains how Title VII interacts with other laws – a complex legal issue not addressed by the prior policies.***
- a) This is *not new law*, either. Federal laws generally preempt inconsistent state laws, and Title VII has been held by the Supreme Court to do so. States can't have overbroad laws that cause discrimination.¹ EEOC's policy simply describes this general principle in the criminal record context.
- b) ***Legislators cannot enact overbroad state and local laws*** that restrict employment of people with criminal records. They must consider the same Title VII job relatedness and business necessity rules that employers do. If an employer policy would otherwise violate Title VII, the fact that an employer adopts the policy to comply with state or local law does not shield it from liability (page 24).

Overall, EEOC's new guidance is a very welcome development. Its issuance educates employers who have not known about or complied with the law. It gives workers who have made mistakes another chance to participate in the workforce and support their families and themselves. ***EEOC is to be commended for its leadership on this crucial civil rights issue.***

¹ International Union v. Johnson Controls, 499 U.S. 187, 210 (1991)(finding "fetal protection" policies barring women of childbearing age from job involving lead exposure to be preempted by Title VII).