



By The Way, Are You A Criminal?

Insights

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The EEOC's Version Of "Don't Ask, Don't Tell"

You've probably heard the news by now – the EEOC seems to want all employers to discontinue, or at least significantly curtail, their use of criminal-background checks. The EEOC's Guidance outlines the agency's position on criminal-background-check policies, but leaves many important questions unanswered. Understanding that the Guidance is not law, but only the EEOC's interpretation of the law, you should keep several issues in mind when hiring.

Can I ask about criminal history on my application?

The EEOC recommends that employers not ask about convictions on job applications. But, if employers do ask, the Commission recommends asking only about convictions that are job related and consistent with business necessity. Your approach should include language indicating that not all convictions will bar employment and you should consider providing a space for the applicant to explain the conviction. Additionally, many states have required language for applications and some may prohibit such inquiries.

When should I run a criminal-background check?

It depends. As noted above, the EEOC would probably prefer that employers eliminate criminal background policies altogether. Recognizing that this is impractical for many employers, due to the risk of negligent hiring, retention, or supervision claims, among other related issues, you should consider at what stage of your hiring process to run criminal-background checks.

The most conservative approach would be to make a contingent offer of employment based on successful completion of the background check, which will impact the least number of applicants. You may also consider waiting until you have identified interviewees, or running the check after excluding applicants who are not minimally qualified or have negative references. Be aware that the earlier in the process you use the background check policy, the number of applicants affected will increase, along with your potential liability.

Can I exclude an applicant based on an arrest?

Probably not. The Guidance is clear that exclusion based solely on an arrest record (without further inquiry) is not acceptable. Many employers are understandably concerned about pending arrests. To consider any arrest, including those pending, requires an independent investigation of the facts.

However, if you perform an independent investigation that confirms the conduct underlying the arrest, and if exclusion of persons committing such acts is job related and consistent with business necessity, you may permissibly exclude the applicant. This may be impractical for many employers – but if you cannot perform the investigation, you should not consider the arrest, at least according to the EEOC.

What does it mean to be "job related and consistent with business necessity?"

It's more complicated than it seems. To determine whether a particular criminal history is job related and consistent with business necessity, you need to consider three factors: 1) the nature and gravity of the offense or conduct, including the harm caused, the specific elements of the crime, and whether it was a felony or misdemeanor; 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.

How old can a conviction be in order to be considered relevant?

The EEOC did not provide specific guidance on this question, but instead recommended that employers consider studies and recidivism data to determine the relevance of a particular conviction. Essentially, if an applicant was convicted for petty theft 15 years ago, but has not been convicted of a crime since, that individual may not be statistically more likely to steal than any other applicants. Obviously, the shorter the period of time considered, the more relevant the conviction. But, this must be balanced against your ability to protect your company against theft and negligent hiring, retention, or supervision claims.

How do I evaluate the nature of the job held or sought?

By reviewing your job descriptions. To determine whether a certain offense is job related, you should review the essential functions of each job or classification you use. If you are hiring a delivery driver for your restaurant, you may want to exclude those convicted for driving under the influence. However, if you are hiring a cashier for the same restaurant, a conviction for DUI may not be relevant. Blanket policies for all job descriptions are likely unlawful according to the Guidance.

Should I be writing this down?

Yes. We recommend that you document your efforts to make the considerations described above. If you rely on a particular study or statistic, you should keep a copy with your revised policy. Documenting your efforts will better prepare your company in the event of an investigation or litigation.

Do I have to consider information the applicant provides?

Yes. In almost all cases, you should provide an opportunity for the applicant to provide information that may mitigate the applicant's criminal history and consider such information. Examples of information you may receive include employment references, job history subsequent to the conviction, or facts surrounding the offense.

But be cautious to ensure that your consideration is not different based on race, or any other protected category, as this can lead to a claim of disparate treatment discrimination.

Are there any less discriminatory alternatives to my policy?

This is a question you should ask once you have revised your policy. Your policy, even though revised to be consistent with the Guidance, may still have an adverse impact on minorities. Therefore, you should always consider alternative policies or practices that may reduce this impact. An example may be allowing applicants more time to provide individual information.

What if I must do a check to comply with federal or state law?

Compliance with *federal* law is a defense, but the EEOC takes the position that Title VII preempts state law and compliance with *state* requirements is not a defense to liability. If there are federal requirements for your employees, you should consider whether your policy excludes applicants beyond the federal requirement. To the extent you exclude applicants that you are not required to exclude, you may be liable. The EEOC does not provide any answers for employers that are subject to state laws or regulations. If you have more stringent state requirements that apply to your applicants and/or employees, you may wish to seek legal counsel.

I heard that Congress defunded the Guidance, so do I still need to comply?

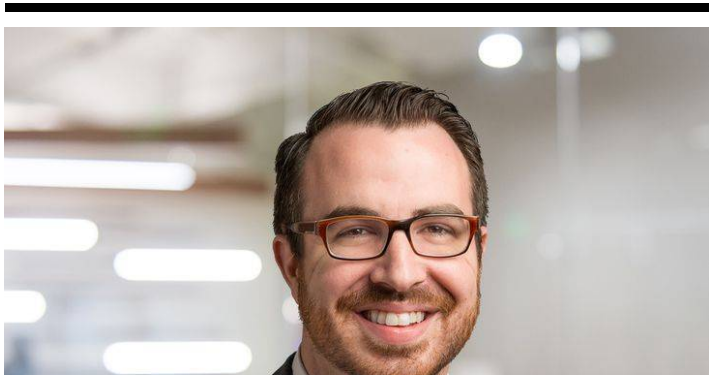
Yes. A Congressional Committee recently voted to defund the Guidance. This action demonstrates that many groups believe the Guidance may be detrimental to employers. However, even if the Guidance is defunded, the EEOC will likely continue its investigations of criminal-background policies through its enforcement of Title VII. Therefore, we recommend that you still take the time to review your policy, consider revisions, and to be sure you understand the risks if you choose not to follow the Guidance.

More To Come

As you can tell, there are numerous questions left unanswered by the Guidance. Drafting a background check policy that is both consistent with the Guidance and that adequately protects your business can be a frustrating process. Nevertheless, the EEOC intends to increase its enforcement of systemic discrimination over the next few years, and revising your policy now may help minimize your risks if the EEOC decides to investigate your company.

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