

RESPONDING TO THE EEOC'S CRIMINAL BACKGROUND CHECK INITIATIVE

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As most of our readers have probably heard 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, particularly with respect to schools, which are often required to conduct criminal-background checks. So, what, if anything, should schools be concerned about in light of this bold policy move by the EEOC? To the surprise of some, the answer may actually be no different than what you are already doing.

WHAT TO ASK FOR...

First, with respect to your job application, the EEOC recommends that employers not ask about convictions. Clearly, the EEOC was not thinking of the uniqueness of the education industry when it came up with this recommendation because, if it had, it would understand that this is likely not an option for most schools. Not only do several states have statutes identifying particular offenses that preclude the hiring of school applicants, but to the extent state law does not require background screening, most accrediting entities do. Thus, schools face a conflict in evaluating the competing interests of their criminal-check obligations and the EEOC's recommendations.

One way to reconcile this situation is to ask only about convictions that are job related and consistent with business necessity. Your approach should initially include language on the application indicating that not all convictions will bar employment and you should provide space for the applicant to explain the conviction.

Next, to determine whether a particular criminal history is job related and consistent with business necessity, schools should 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 completion of the sentence; and 3) the nature of the job held or sought.

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 controller or teacher, you may want to exclude those convicted for fraud. If you are hiring a custodian, a conviction for fraud may not be relevant, although conviction for a crime of violence likely would.

The EEOC did not provide guidance as to how old a conviction must be before it is considered irrelevant, but instead recommended that employers consider studies and recidivism data to determine the relevance of a particular conviction. To illustrate, if a teacher applicant was convicted for theft 15 years ago, but has not been convicted of a crime since, that applicant may not be statistically more likely to steal than any other applicants. The opposite obviously holds true for an applicant with a recent conviction for child abuse or sexual assault.

...AND HOW TO ASK FOR IT

Now that you have a plan in place as to what convictions you are looking for, the question remains of how to implement that plan. Our recommended approach is 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.

Finally, as discussed above, some schools are required under state law to exclude applicants with certain conditions. With that said, many of you are probably wondering whether you are protected from liability simply for complying with state law. The answer, unfortunately, is unresolved. 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. Moreover, the EEOC does not provide any answers for employers that are subject to state laws or regulations.

Thus, to the extent you exclude applicants that you are not required to exclude, you may be liable. In sum, if your school is subject to stringent state requirements that apply to your applicants or employees, you may wish to seek legal counsel to ensure your criminal-check policy is, at the least, examining history that is job related and consistent with a business necessity.

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