



# Employers Beware When Conducting Criminal Background Checks

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The Equal Employment Opportunity Commission (EEOC) recently issued Enforcement Guidance (Guidance) on arrest and conviction records in employment decisions. Employers need to revise their use of criminal background checks in light of this Guidance.

## Background.

90% of employers perform criminal background checks. Reasons for using criminal background information are to prevent theft, fraud, workplace violence and liability for negligent hiring or to comply with various laws.

Having a criminal record is not a protected basis in Title VII, but liability can arise for employers from two theories: “disparate treatment” or “disparate impact.” Disparate treatment occurs when an employer treats a person in a protected category differently than someone who is not in that same category.

Disparate impact liability arises when an employer maintains an apparently neutral policy or practice that has the effect of disproportionately screening out a group protected by Title VII and the employer fails to demonstrate that the policy or practice is job-related. Employers should avoid actions that could violate Title VII under either of these theories. This article outlines compliance tips for employers.

1. **Comply With Applicable Laws.** Some state laws, including those in California, Connecticut, Hawaii, Massachusetts and New Mexico, restrict or prohibit the use of criminal background checks.
2. **Do Not Use A Blanket “Any Conviction” Standard.** A policy denying employment to all applicants with criminal conviction records violates Title VII.
3. **Do Not Consider Arrest Record.** Using arrest records has a disparate impact on African Americans and Hispanics. Thus, employers should not exclude applicants based on an arrest record.
4. **Revise Your Employment Application.** If you choose to make inquiries about conviction records, include the following disclaimer: “Answering ‘yes’ to any of these questions does not constitute an automatic bar to employment. Among other things, we will consider the nature and gravity of

an automatic bar to employment. Among other things, we will consider the nature and gravity of the offense or conduct; the time that passed since the offense or conduct and/or completion of the sentence; and the nature of the job you are seeking. If you answer 'yes' to any of the following questions, be sure to provide an explanation."

5. **Assess Each Situation.** Before disqualifying any applicant based on criminal history, consider the circumstances surrounding the offense; the number of offenses for which the individual was convicted; age at the time of conviction; evidence that the individual performed the same type of work, post-conviction, with no incidents of criminal conduct; the length and consistency of employment history before and after the offense or conduct; rehabilitation efforts, e.g., education/training; employment and other information regarding fitness for the particular position; and whether the individual will be bonded.
6. **Develop A Policy For Conducting Background Checks.** Develop a written policy and procedure for screening applicants and employees for criminal conduct that identifies job requirements and circumstances under which the job is performed; states specific offenses that may demonstrate unfitness for performing such a job; determines the duration of exclusions for criminal conduct based on available evidence; and justifies the business reasons for the policy and the procedures.
7. **Keep Information About Criminal Backgrounds Confidential.** Keep information obtained through background checks confidential.

## Conclusion

Employers are in a Catch-22: either they will hire someone who could do harm in the workplace or expose the employer to liability or they can get in trouble for not complying with applicable laws if they continue to require criminal background checks. At the end of the day, the use of criminal background checks can be an effective risk management tool. However, they must be done carefully and in compliance with applicable laws.

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