

PUBLICATION

EEOC Provides Clarification on Use of Criminal History Information in Hiring Decisions

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What are the requirements for employers that use criminal history information in making employment decisions? Are employers required to take on the onerous task of individually assessing applicants to ensure that they do not discriminate against a particular group of people? Are targeted screens sufficient to avoid potential liability for discrimination?

The EEOC recently released informal discussion letters outlining what it deems to be the legal obligations of employers that use criminal history information to make employment decisions. As it has consistently made clear, the EEOC believes that employers are at risk for Title VII liability when using criminal history information to exclude individuals from employment, because such exclusion tends to disproportionately affect minorities. In order to avoid such liability and to show that its policy governing the use of criminal history information is necessary, the EEOC has stated that the employer must perform a "targeted" screen by considering the following factors:

- the nature and gravity of the offense or offenses for which the applicant was convicted;
- the amount of time that has passed since the conviction and/or completion of the sentence; and
- the nature of the job held or sought.

The EEOC has further stated that when an employer excludes an applicant from hire or makes an employment decision based upon an individual's criminal record, the employer **should** give the individual an opportunity to provide more facts before the employer makes a final decision, or it should otherwise perform an "individualized assessment." An individualized assessment "generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity." There is some confusion, however, regarding whether employers must always provide an individualized assessment of every excluded applicant, and if so, under what circumstances. EEOC Chair Jacqueline Berrien has provided some clarification on the EEOC's guidance and the use of individualized assessments.

According to Berrien, the EEOC does not urge or require individualized assessments of all applicants and employees, but rather encourages the following two-step process: 1) that employers use a "targeted" screen of records, which considers the nature of the crime, the time elapsed and the nature of the job; and 2) that employers perform an individualized assessment for those individuals who are screened out, which according to Berrien, provides a way for employers to ensure that they are not mistakenly screening out qualified applicants or employees based on incorrect, incomplete or irrelevant information, and for individuals to correct errors in their records.

While individualized assessments are strongly encouraged, the EEOC makes clear that employers may decide to never conduct an individualized assessment if they are able to demonstrate that their targeted screen is job related and consistent with business necessity. The individualized assessment is simply "a safeguard that can help an employer to avoid liability when it cannot demonstrate that using only its targeted screen would always

be job related and consistent with business necessity." Furthermore, whether an employer's policy on using criminal history information is job related and based on business necessity, as well as whether excluded individuals should be given an individualized assessment, only becomes relevant when the policy results in a disparate discriminatory impact upon a protected group of people.