



The Use and Consideration of Arrest and Conviction Records in Employment Decisions

Presented by

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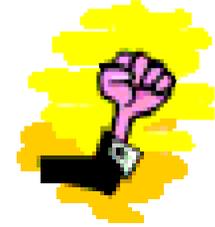
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Training Objectives



- Provide an overview of the laws enforced by the EEOC
- Discuss the EEOC's guidance on the use of arrest and conviction records in employment decisions
- Define and discuss disparate treatment and disparate impact
- Discuss best practices

Laws Enforced by the EEOC



- Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on sex, race, religion, national origin, and color
- The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination against persons 40+ and older
- The Equal Pay Act of 1963 (EPA) prohibits sex-based wage discrimination between women and men in the same establishment performing equal work under similar working conditions
- The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination against a person with a disability
- Genetic Information Non-Discrimination Act of 2008 (GINA) prohibits discrimination based on a person's genetic information
- All laws prohibit **retaliation** against persons who engage in protected activity.



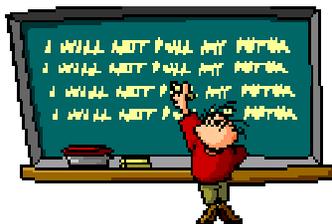
Guidance Not New But Updated

- Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, 02/1987
- EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment, 07/1987
- Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII, 09/07/1990
- EEOC Compliance Manual, Section 15: Race & Color Discrimination, 04/2006
- 04/2012 – Purpose: To consolidate and update ... guidance documents regarding the use of arrest or conviction records in employment decisions

Additionally...



- Since at least 1969, the EEOC has investigated Title VII charges challenging criminal record exclusions under Title VII.
- Since the 1970s, Federal courts have decided Title VII cases involving challenges to criminal record exclusions under disparate treatment and disparate impact theories.



Reasons for Update

- **More working-age people have criminal records, especially Blacks and Hispanics**
- **Legal developments under Title VII**
- **Federal, state, and local governments foster reentry and employment**
- **Criminal information widely available: Internet and “consumer reporting agencies” (e.g., Fair Credit Reporting Act)**
- **Most employers now do criminal background checks for some or all jobs to:**
 - **Avoid exposure to negligent hiring liability**
 - **Reduce the risk of violence, theft, or fraud**
 - **Comply with federal laws requiring background checks and exclusions**
 - **Comply with state laws requiring background checks and exclusions**

Background Information



- Per SHRM, in 1996 51% of surveyed members conducted criminal background checks.
- By 2010 92% of surveyed members conducted criminal background checks on all or some job applicants.
- Per population census data, 70% is White, 12.5% is Hispanic, and 12.3% is Black.
- But, 1 of 205 (.005%) Whites, 1 of 79 (.012%) Hispanics, and 1 of 33 (.03%) Blacks are sentenced to prison.



Reasons for Today's Discussion

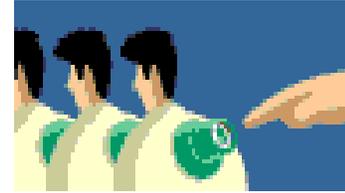
- Using criminal background checks when making employment decisions can lead to a Title VII violation.
- A Title VII claim can be brought under:
 - Disparate Treatment – intentionally treating a person differently because of a prohibited basis.
 - Disparate Impact – a neutral policy that has the effect of singling out a disproportionate number of people in a protected class.

Important Supreme Court Decisions



- Disparate Treatment: *Green v McDonnell Douglas* - In 1973 the Supreme Court established the framework of the prima facie case, the minimum amount of proof required of a complainant to shift the burden of production to the employer to provide a legitimate, nondiscriminatory reason for its action.
- Disparate Impact: *Griggs v Duke Power Company* – In 1971 the Supreme Court ruled that the employer's job requirement, although neutral on its face, did not pertain to applicants' ability to perform the job, had a discriminatory disparate impact on Black employees and violated Title VII.

Disparate Treatment Elements



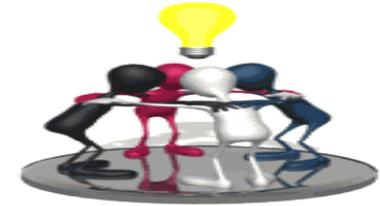
- Person is a member of a protected class
- Person is qualified and applied for a vacant position the employer was seeking to fill
- Person was rejected despite the person's qualifications
- After person's rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications
- If the person establishes a prima facie case, the burden of production shifts to the employer to provide a legitimate, non-discriminatory reason for its action
- The person then must prove the employer's proffered reason is a pretext for discrimination.



What if ...

- James (Black) and John (White) apply for jobs with XYZ in the shipping department. Both meet the job requirements of related work experience, skills, and education. Both consent to background checks. XYZ learns that James and John were arrested while in high school and pleaded guilty to possession and selling marijuana. Neither had any other offense.
- The HR director does not hire James. He believes all Blacks are drug dealers. He hires John because he believes John was influenced by peer pressure.
- Could there be a violation of Title VII?

What if ...



- James (Black) learns that XYZ employs several Whites who have been arrested and convicted for various offenses but does not employ any Blacks or Hispanics who have been arrested and convicted of any offense or who have only been arrested.
- Could the employer's actions be discriminatory against Blacks as a class?



And then there is...

- Joe (White) and Tad (Latino) are recent high school grads looking for summer jobs before going to college. Both had 4.0 grade point averages and convictions when 16. Both apply for lab jobs with Wii2 and are interviewed. Tad has prior work experience in running his own lawn cutting service for 3 years. Joe has no prior work experience. Joe explains his conviction for hacking into his school's computer system and changing friends' grades. Tad explains being convicted of B&E at his high school as part of the Nerds Club initiation.
- The lab manager hires Joe but sends Tad a rejection letter. The lab manager tells a colleague that Tad is only qualified to do manual labor and is a criminal.
- Is there a possible violation of Title VII?

Disparate Impact Elements



- Employer has a neutral policy or practice that disproportionately screens out or disadvantages members of a protected group.
- Employer may defend its policy or practice by showing that the challenged policy or practice is job related and consistent with business necessity.
- Complaining Party may show there is a less discriminatory alternative employment practice and the employer refused to adopt it.



Another Court Ruling: Green v. Missouri Pacific Railroad (MoPac)

- Buck Green (Black) applied for a job with MoPac. Green was a Vietnam-era conscientious objector who was convicted in December 1967 for refusing military induction and served 21 months in prison. He was paroled in 1970.
- Since 1948 MoPac had an absolute policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense.
- Green sued, alleging the policy and practice operated to disqualify Blacks for employment at a substantially higher rate than Whites and it was not job-related.

MoPac's Reasons for Its Policy



- Fear of cargo theft
- Handling company funds
- Bonding qualifications
- Possible impeachment of an employee as a witness
- Possible liability for hiring persons with known violent tendencies
- Employment disruption caused by recidivism
- Lack of moral character of persons with convictions



The Court said...

- MoPac's employment practice was facially neutral, but the rejection rate for blacks was 2 ½ times that of Whites under the policy.
- There was no business necessity exception to their policy. The policy was too broad to be justified by business necessity.
- According to the Court, "*We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed*" (1975).

Meeting the job related and consistent with business necessity standard



- Validation - Employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Process.
- Targeted Screen + Individualized Assessment - The employer develops a *targeted screen* considering the three *Green* factors, and then provides an opportunity for an *individualized assessment* before the employer acts based on the results of the targeted screen.



Validation

- The Uniform Guidelines describe three different approaches to validating employment screens:
 - Criterion-related validity study
 - Content validity study
 - Construct validity study
- For more in-depth description of the UGESP and validation studies, see
 - http://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html
 - AND
 - <http://www.uniformguidelines.com/>
 - 29 C.F.R. 1607.5

Targeted Screen: 3 Green Factors



1. Nature and gravity of the offense or conduct
2. Time that has passed since the offense, conduct and/or completion of the sentence
3. Nature of the job held or sought

Individualized Assessment: The employer ...



- **Informs** the individual that s/he may be excluded due to evidence of past criminal conduct
- Provides an **opportunity for the individual to explain**
- Considers whether the **individual's additional information** supports or undermines the exclusion



Individualized Assessment: Employer considers...

- Inaccuracy of criminal record
- Age at conviction
- Consistency, quality, and length of employment history before and after
- Rehabilitation efforts
- Employment/character references

What if you can demonstrate that the policy or practice is job related and consistent with business necessity?



- The employee or applicant has the burden of showing that there is a **less discriminatory alternative employment practice.**



Crime-Specific Exclusions

- An exclusion for specific crimes for specific jobs may be job-related and consistent with business necessity, depending on:
 - The nature and gravity of the offense or offenses for which the individual was convicted;
 - The time that has passed since the conviction and/or completion of the sentence;
 - The nature of the job held or sought

For Example:



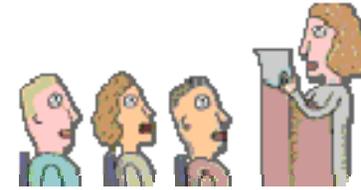
- Jamie (Black) worked for Shred-4-U for five years before the company changed owners. Jamie has great evaluations indicating that he is reliable, trustworthy and honest. Jamie applies for his former job with the new owner but is rejected because a background check reveals that he pled guilty to misdemeanor insurance fraud five years ago.
- The employer refuses to reconsider Jamie's application, stating that he poses an elevated risk of dishonesty in that its clients entrust it with handling sensitive and confidential information and materials. It believes persons convicted of any crime related to theft or fraud in the past five years are excluded from employment.



Based on these facts, the EEOC says...

- After confirming disparate impact based on race, the EEOC finds reasonable cause to believe that the new owners violated Title VII because the targeted exclusion was not job related and consistent with business necessity.
- The employer's conclusion that Jamie's conviction demonstrates that he poses an elevated risk of dishonesty is not factually based given Jamie's history of trustworthiness in the same job.

Example 2



- County Community Center rents rooms for meetings and parties to organizations, groups, businesses, families, etc.
- It has a targeted rule prohibiting anyone with a conviction for theft crimes (i.e., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial information for at least four years after the conviction and release from incarceration.
- The rule was adopted by its HR Department based on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes.
- The County offers an opportunity for individuals identified for exclusion under the rule to provide information showing that the exclusion should not be applied to them.



Isaac (Hispanic) applies for a full-time job as administrative assistant. The job involves accepting credit card payments for room rentals, in addition to having unsupervised access to the personal belongings of people using the facilities. Isaac pled guilty 1½ years ago to credit card fraud but he did not serve any prison time.

The County informs Isaac of his exclusion and he is given an opportunity to provide additional information. Isaac confirms the conviction but provides a reference from his current employer and asks the County to let him prove that he is trustworthy. The County rejects Isaac's application.



The EEOC would say...

- The Targeted Screen was carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and the policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct.
- Therefore, even though the policy had a disparate impact on Hispanics, there is no evidence of discrimination because the policy is job related and consistent with business necessity.

Arrest Records



- Excluding individuals from employment because they have an arrest record may have an adverse impact on African Americans and Hispanics.
- Arrest records should not be used as an absolute bar to employment.
- An arrest, pending charge, or conviction does not automatically demonstrate that an individual is unfit for all jobs.



Arrest Record Example #1:

John was stopped by the police in a predominantly White part of town. The officer interrogated him about his destination. John became annoyed and irritated. He commented to the officer that his only offense is "driving while Black." The officer arrests John for disorderly conduct, but the charges are dropped.

John has been with his employer for 15 years. He applies for a promotion to an executive position.

The employer's practice is to deny such promotions to individuals with an arrest record because an arrest record is an indication of irresponsibility and untrustworthiness. John is denied the promotion.

EEOC would say...



If John filed a Title VII charge based on these facts, and disparate impact based on race were established, the EEOC would find reasonable cause to believe that the employer violated Title VII.

Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes.



Arrest Record Example #2:

Jim, a Hispanic male, applies to Lodge City for a position as a police officer. Arrested 3 years earlier for burglary, he admits to the crime even though the charge was dismissed. Jim claims he is a changed man and has matured since the arrest.

The arrest rate for Hispanics is substantially disproportionate to that of Whites in Lodge City.

Lodge City police officers are: 1) entrusted with protecting the public; 2) authorized to enter nearly any dwelling under the appropriate circumstances; and 3) are often responsible for transporting valuables which are confiscated as evidence.

The EEOC would say...



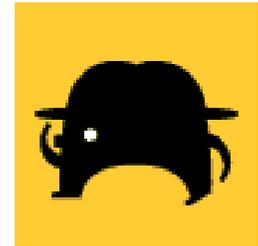
Even if the department is satisfied that Jim has reformed, it may reject him because his credibility as a witness in court could be damaged if he were asked about his own arrest and the surrounding circumstances while testifying against a person he had arrested. Since an essential element of police work is the ability to effect an arrest and to credibly testify against the defendant in court, the department would have a business justification for rejecting Tom.

When deciding whether or not to use any selection device or test, employers should consider . . .



- The purpose for which the selection device exists;
- The impact which the selection device will have upon protected groups;
- The nature of the job held or sought;
- The relationship between the duties of the job and what the selection device measures; and
- Alternative selection devices that would serve the employer's interest equally as well but do not have the disparate impact.

Best Practices



- Eliminate across-the-board policies that exclude people from employment based on any criminal record (“blanket exclusions”)
- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
- Train managers, hiring officials, and decisionmakers on implementing policy & procedures consistent with Title VII.
- Limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity when asking questions about criminal records.



Federal, State and Local Laws and/or Regulations

- Employers in some industries are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations.
- Compliance with federal laws and/or regulations is a defense to a charge of discrimination.
 - However, if an employer decides to impose an exclusion that goes beyond the scope of a federally imposed restriction, the discretionary aspect of the policy would be subject to Title VII analysis.
- Compliance with state or local law **does NOT shield** an employer from Title VII liability
- Other Precautions: Document the policy's rationale
- Record justification for policies and procedures, consultations and research used to design policy.
- Keep criminal record information confidential.