

EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

U.S. Equal Employment Opportunity Commission
Office of Legal Counsel
2012

1

Why is this a Title VII Issue?

• **Legal**

- Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination based on race, color, religion, sex, or national origin.
 - Title VII disparate treatment
 - Title VII disparate impact

• **Practical**

- For example, Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 958, Figure 6 (2003), www.princeton.edu/~pager/pager_ajs.pdf.

2

Why Did the EEOC Update Its Policy Statements Now?

- More working-age people have criminal records, especially African Americans and Hispanics
- Legal developments under Title VII
- Federal, state, and local governments foster reentry and employment

3

Why Did the EEOC Update Its Policy Statements Now?

- Criminal information is widely available: Internet and “consumer reporting agencies”
 - Fair Credit Reporting Act
- Most employers now do criminal background checks for some or all jobs
 - Avoiding exposure to negligent hiring liability
 - Reducing the risk of violence, theft, or fraud
 - Complying with federal laws requiring background checks and exclusions
 - Complying with state laws requiring background checks and exclusions

4

**Title VII Legal Analysis:
Disparate Treatment Discrimination**

- **Title VII Case:** Plaintiff shows that the employer treated him differently because of his race, national origin, or another Title VII protected basis. 42 U.S.C. § 2000e-2(a).
- **Enforcement Guidance Examples 1 and 2:** Applicants with same education, skills, and records, but treated differently based on race or national origin.
- **Proof may include:** biased statements, similarly situated comparators treated differently; inconsistencies in the hiring process.

5

Disparate Impact Analysis

Elements:

- Complaining party shows that employer uses a particular criminal record exclusion policy or practice . . .
- That causes a disparate impact . . . and
- Employer shows that the exclusion is “job related for the position in question and consistent with business necessity” OR
- Complaining party shows that there was a less discriminatory alternative and the employer refused to adopt it.

6

Understanding Title VII Disparate Impact

- The story of Buck Green, an African American Vietnam-era conscientious objector excluded by a blanket exclusion from working for the Missouri Pacific Railroad.
- The story of Douglas El, an African American 55-year-old paratransit driver-trainee, who was fired when the employer discovered a conviction for a sole, violent offense that occurred 40 years ago.

7

Disparate Impact Discrimination and Criminal Records

- Particular policy or practice
 - Criminal records screen that excludes people with convictions from warehouse jobs
- Disparate impact based on race, national origin, or another Title VII basis
 - National data supports doing EEOC investigation
 - Employer has opportunity to show otherwise
 - Applicant data, workforce data, local population data

8

Determining Whether a Criminal Conduct Exclusion Is Job Related and Consistent with Business Necessity

In the Enforcement Guidance, the Commission states that there are **two circumstances** in which the it believes employers will consistently meet the “job related and consistent with business necessity” standard.

9

Job Related and Consistent with Business Necessity

First, the employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible).

10

Job Related and Consistent with Business Necessity

- Second, the employer develops a *targeted screen* considering at least the nature of the crime, the time elapsed, and the nature of the job (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.

11

What is a “targeted screen”?

A “targeted screen” accounts for the three *Green* factors:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought.

12

Individualized Assessment: Process

- Informing the individual that he may be excluded because of his past criminal conduct (typically, as identified by a targeted screen); and
- Providing an opportunity to the individual to show that the exclusion does not properly apply to him, and considering his information.

13

Individualized Assessment: Information

- Information about the inaccuracy of his criminal record, for example.
 - Mistaken identity
 - Inaccurate reporting
- Age at the time of conviction: younger vs. older
- Consistency, quality, and length of employment history before and after the offense or conduct
- Rehabilitation efforts (e.g., education/training), and
- Employment/character references regarding fitness, among other factors.

14

Targeted Screen Solely Under *Green Without* Individualized Assessment

“Such a screen would need to be **narrowly tailored** to identify criminal conduct with a **demonstrably tight nexus to the position in question.**”

15

Examples of Criminal Record Exclusions
That Do Not Consider the *Green* Factors

- A policy or practice that requires an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct.
- Enforcement Guidance Example 5:
 - Automatic exclusion in online job application
- Enforcement Guidance Example 6:
 - Automatic exclusion without individualized assessment for current employees with good record

16

Less Discriminatory Alternative

- Under Title VII, even if an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a plaintiff may still prevail by demonstrating that there is a less discriminatory “alternative employment practice” that serves the employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt. 42 U.S.C. § 2000-2(k)(1)(A)(ii), (C).
- This is a fact-specific inquiry, that will depend on the facts and circumstances of each case.

17

Compliance with Federal Laws and/or
Regulations

- In some industries, employers 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.

18

Compliance with State or Local Laws or Regulations

- States and local jurisdictions also have laws and/or regulations that restrict or prohibit the employment of individuals with records of certain criminal conduct.
- But Title VII -- *by its express terms* -- preempts state and local laws or regulations if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.
- Therefore, if an employer's exclusionary policy or practice is *not* job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from, and is not a legal defense to, Title VII liability.

19

Employer Best Practices

- Eliminating across-the-board policies that exclude people from employment based on any criminal record.
- Developing a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
- Training managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.
- When asking questions about criminal records, limiting inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

20

Additional Information

- For additional information about the topics we discussed during the presentation, please reference the following sites:
 - Enforcement Guidance:
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
 - Qs and As:
http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm
 - What You Should Know Fact Sheet:
http://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm

21
