

# Criminal Records, Employment Screening and the EEOC

By Kevin Prendergast

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing federal laws relating to discrimination in employment.

The commission has concluded that certain minority groups have higher rates of arrest and incarceration than non-members of those groups. The EEOC specifically found that the use of criminal records has an adverse impact on African-American and Latino males and the use of those records may have a discriminatory impact on employment for those groups. The commission has opined that in order to appropriately use criminal records as a screening tool, employers must be able to establish that the exclusionary item is “job related and consistent with business necessity.”

Employers may be left wondering what exactly “job related and consistent with business necessity” means. In a 2014 guidance memorandum, the EEOC stated that in considering conviction records, an employer must initially consider three factors.

First, the commission recommends assessing the nature and gravity of the offense and the underlying conduct with reference to the harm caused by the crime. For example, the commission distinguishes between felonies and misdemeanors. Also, the harm inflicted by the crime can be considered such as whether there was bodily injury or the extent of loss. Thus, an employer should consider whether the crime was work-related, involved violence or threats of violence or involved a significant loss.

Secondly, the EEOC does not endorse a hard and fast rule for excluding individuals convicted of crimes within a certain period of time. While such policies produce consistency in results, they may be hard to justify under the “job related and consistent with business necessity” standard. A better approach is to view the amount of time that has elapsed and what the individual has done during that time. Examples would be where an individual has earned a degree or other academic achievement, they have obtained and maintained consistent employment, whether the person has remained out of trouble with the law or demonstrated some other manner of rehabilitation.

The third consideration involves the nature of the position sought. The guidance indicates that employers should go beyond the job title and look at the job duties, the essential functions of the job, the circumstances under which the job is performed

(level of supervision, interaction with co-workers) and the environment where the job is performed. Some examples of job relatedness would be excluding individuals with theft offenses from positions having unsupervised access to financial or personal information or excluding persons with violent crimes from working in an office in close proximity to other individuals. The key is finding a legitimate nexus between the criminal activity and the position sought.

While consideration of the three factors is advisable, the EEOC contemplates an employer doing more than just analyzing those factors in a vacuum. The language of the guidance strongly suggests that the applicant should be made part of the process through an “individualized assessment.” The commission lists the following seven factors an employer should consider when performing an individualized assessment:

1. The number of offenses for which the individual was convicted.
2. Age at the time of conviction or release from prison.
3. Evidence that the individual performed the same type of work, post-conviction with the same or a different employer, with no known incidents of criminal conduct.
4. The length and consistency of employment history before and after the offense or conduct.
5. Rehabilitation efforts, *e.g.*, education or training.
6. Employment or character references and any other information regarding fitness for the particular position.
7. Whether the individual is bonded under a federal, state or local bonding program.

While this process may appear onerous, an employer who develops a policy to conduct an individualized assessment and then develops documents listing each consideration will be on the right path toward compliance.

The EEOC also stated their position that the use of arrest records without a subsequent conviction “is not job related and consistent with business necessity.” It is the commission’s position that an arrest without a conviction is of little value to show that the person actually engaged in the conduct alleged in the criminal complaint. However, the guidance states that the underlying conduct of an arrest can be considered if that conduct would make the individual unfit for the position.

Several recent court opinions have criticized the EEOC’s guidance and the commission’s positions certainly do not carry the force of law. However, ignoring the guidance could lead to an enforcement action which could prove costly even if the employer prevails. Following the guidance would create a safe harbor for employers to avoid a possible action. Additionally, an increasing number of states and cities have passed “ban the box” laws. These laws place restrictions on how employers use criminal records and often require an analysis similar to that suggested by the EEOC.



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