

Criminal Background Information In Employment: It's Not What You Learn, But How You Use It

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The Problem

Job applications frequently include questions such as:

"Have you ever been arrested?"

"Have you ever been charged with a crime?"

"Other than a traffic ticket, have you been convicted of a crime?"

The employer usually believes these questions are harmless but nevertheless necessary to diligently screen candidates. The advantages of knowing such information when hiring or promoting is obvious. However, a recent "Enforcement Guidance" issued by the Equal Employment Opportunity Commission ("EEOC") reinforces the warning that employers should be careful about how they use criminal background information they obtain or they could risk a claim of discrimination.

The EEOC is the government agency charged with enforcing Title VII of the Civil Rights Act of 1964 ("Title VII"), a law which applies to most employers with 15 or more employees and which prohibits employment discrimination based on race, color, religion, sex, or national origin. The EEOC's recent issuance of the "Guidance" is based on legal developments and studies over the past 20 years, during which there has been a major increase in the number of people with criminal records in the working-age population. Studies also show that incarceration and arrest rates are particularly high for African-American and Hispanic males. Additionally, as a result of the explosion in information technology, employers now have increased access to criminal history information, but such information can be inaccurate or incomplete.

Title VII does not prohibit employers from obtaining criminal background information about a candidate or employee. However, certain uses of criminal information, such as a blanket policy and practice of excluding applicants or disqualifying employees based solely upon information indicating an arrest record, can result in a charge of discrimination.

Claims of Discrimination: Disparate Treatment and Disparate Impact

An employer's use of criminal background information can result in two different types of discrimination charges. The first is a disparate treatment claim, which is an allegation that the employer intentionally treats candidates or employees differently based on one of the categories protected under Title VII. For example, two applicants, one Caucasian and one Hispanic, apply for the same position. They both have similar education, skills, and experience, and both pled guilty to possession of marijuana six years ago while they were in high school. Neither applicant has had any arrest or criminal conviction in the ensuing years. The employer denies the Hispanic candidate a second interview because of his criminal record. However, the

employer notes the Caucasian candidate's criminal history, but considers it a youthful indiscretion and refers him to the next level of interviews. It is easy to see how the employer could be found to have intentionally treated the applicants disparately, or differently, based on national origin, in violation of Title VII.

In addition to disparate treatment, an employer can also inadvertently subject itself to a claim of disparate impact in violation of Title VII if the employer has a practice or policy regarding background screening that, although unintentional, in fact results in a negative impact on any group protected under Title VII. For example, the employer may have a policy of not hiring anyone with any history of arrest. The community where the company is located has arrest statistics consistent with the national trend. Thus, the unintended result of this employment screening policy is that African Americans are disproportionately excluded from the employer's workforce. Depending on the reason for exclusion, the employer risks a claim that the policy or practice has a disparate impact in violation of Title VII.

Does the EEOC's Guidance dictate that an employer cannot use arrest, conviction, or other criminal records in hiring and promotional decisions? The answer is a resounding "NO." What an employer should do, however, to minimize risk in the selection or promotion of employees, while at the same time avoiding an EEOC charge or Title VII lawsuit, is:

- Distinguish between decisions based on arrest versus conviction; and,
- Make sure that the screening criteria are job-related and consistent with the employer's actual business necessity.

Arrest vs. Conviction

A record of arrest is not a proven indicator of criminal conduct (after all, as a nation, we have long and proudly boasted that in the United States: "All persons are innocent until proven guilty."), and does not reflect the final disposition of the incident which can be a dismissal, acquittal, or other disposition short of a conviction, as well as a conviction. Basing a hiring decision on an arrest record is presumptively discriminatory because arrest rates are higher for certain minority and Title VII protected populations. An employer should instead investigate the conduct that led to an arrest and "make an employment decision based on the conduct underlying the arrest [to determine] if the conduct makes the individual unfit for the position in question."

For example, an employer may have a policy that no employee who has an arrest record can be promoted to management because the employer wants only "the best of the best" in management. As a result, an African-American employee is refused the promotion to the position of IT supervisor because he was arrested for a gang-related trespass incident 20 years earlier. No conviction resulted, and the employee has had no further contact with the criminal justice system. He has received stellar evaluations and meets all other qualifications for promotion. Instead, the employer promotes a less-experienced Caucasian employee who, although he has no arrest record, has fewer documented skills and education. Based on these facts, the EEOC is likely to find reasonable cause that the employer has violated Title VII.

In contrast, the EEOC views convictions as "usually serv[ing] as sufficient evidence that the person engaged in particular conduct, given the procedural safeguards associated with trials and guilty pleas." The EEOC, however, recommends that employers not ask about conviction history on a job application, but make the inquiry later in the selection process and limit the inquiry to convictions that are related to the job in question and consistent with the employer's specific business necessity.

Job-Related and Consistent with Business Necessity

To reduce liability for a claim of discrimination, an employer's screening related to criminal history should be specifically job-related and consistent with business necessity or, as the EEOC states, the employer should endeavor "to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." An employer should attempt to use the information for exclusion only where there is a tight nexus between the criminal conduct and the position. To analyze whether a screening standard is linked to a specific job, an employer should consider:

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

Consider the following example: An employer's application process is conducted exclusively on-line. The application program automatically rejects any applicant who indicates a criminal conviction. The employer uses this process for all jobs, from executive to hourly non-skilled workers. The screening process does not include any analysis of the factors listed above. If a Title VII charge is filed by a member of a protected class, the EEOC could well find actionable discrimination because the employer's blanket exclusion does not meet the criteria for being job-related and consistent with business necessity.

In contrast, a policy of the same employer prohibiting anyone convicted of a theft crime within the last four years from working in a position with access to petty cash or to credit card transactions would be a more acceptable, targeted use of screening criteria. Assume that the employer adopts this more focused policy and then receives an application for a position with unsupervised access to the employer's credit card or customer records. The applicant has a conviction for credit card fraud in the last 18 months. The employer has subscribed to industry information that indicates that persons with theft convictions in the past four years are 50% more likely to commit embezzlement by using credit cards. If the applicant is a member of a protected class (i.e., the only non-Caucasian applicant) and is denied the promotion based on the conviction record, the employer is less likely to be found to have violated Title VII because the criminal history was used for a targeted exclusion that was job-related and consistent with business necessity.

Conclusion

Criminal background information on employment applicants and employees can successfully assist an employer in selecting and managing a workforce. However, employers should carefully consider the use of such information in excluding individuals from hire or promotion. Employers should avoid the risk of an employment discrimination charge arising from use of criminal history by being cautious about the validity of the information and by making sure that criteria are job-related and consistent with business necessity.

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