

EEOC Enforcement Guidance on Arrest and Conviction Records in Employment
Decisions Under Title VII
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NOTE: The following should not be considered legal advice. Please consult your own legal advisor before implementing any of the following recommendations.

On April 25, 2012 the Equal Employment Opportunity Commission (EEOC) issued its expected guidelines (1) indicating they are a continuation of the 2008 Eradicating Racism and Colorism from Employment initiative discussed in previous articles (2). While the guidelines do express concerns about the possible misinterpretation of information contained in criminal records – that not all arrests result in convictions – the real issue for Polygraph, Human Resource and Background Investigators conducting pre-employment interviews will be the new emphasis on numerical disparities as the driving force for claims of discrimination in employment. Essentially, an applicant of a protected group merely has to show that an employer has a policy or practice with a disparate impact to establish sufficient proof justifying a federal investigation. The intentions of the employer's policy or practice are irrelevant. Once disparate impact has been shown, it then becomes the employer's obligation to demonstrate Business Necessity and, in some cases, the absence of a less disparate alternative.

Statistical racial disparity clearly is true for just about anything involving the criminal justice system. Contacts, arrests, convictions, incarcerations, probations, paroles and the most valid predictor of future conduct, commissions, all clearly have a significant disparate impact on African Americans and Hispanics vs. White racial groups (3). In addition, the methodology used to obtain criminal information doesn't appear to effect the disparity in the rates. Criminal record checks, application/Personal History forms and pre-employment interview admissions all have the same net effect – they result in statistical racial disparities. Notably lacking in the new guidelines is any discussion of these same – and even more pronounced – disparities as they exist on the basis of gender, another Title VII protected group. Even a superficial review of the number of men's and women's prisons, male and female inmates, demonstrates once again that crime in America is still a predominately male activity. This should allow some male job applicant to claim "reverse" gender discrimination because some employer solicited information about past criminal conduct. The bottom line effect of the new EEOC guidelines will be to force many employers into a "guilty until proven innocent" scenario. Unfortunately, some employers may choose to avoid this inevitability by simply discontinuing the solicitation of information regarding criminal behavior. This, in turn, may lead to the assumption that certain questions (about arrests and convictions) must be illegal or, at the very best, not worth the risk of attracting an EEOC challenge.

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This prediction is not misplaced. There are public and private employers who still today believe it is illegal to ask about age or marital status during the pre-employment process when in fact the various laws make the practice of discriminating on the basis of these variables – not the questions – illegal. There clearly are appropriate and inappropriate times to solicit certain information but the issue of avoiding nuisance litigation is separate from the issue of solicitation legality.

As will be discussed below, the time and money involved in proving Business Necessity, the lack of viable alternatives and the negative effect of an EEOC challenge on recruitment can be far beyond the reach of most public and private employers, a reality that, though never mentioned in the new guidelines, had to be evident to the authors of this initiative.

The obvious conclusion one must draw about the new criminal history guidelines is the assumption that employers will only and always use the information to racially discriminate against applicants. I have helped design and defend employment selection systems for federal, state and local government agencies as well as both large and small private employers and have yet to see either practices or policies in the last thirty years designed to create or preserve racial discrimination in employment. Nevertheless, it is undeniable that there is a disparate racial impact with regard to information tied to criminal records linked to the criminal justice system. While some have stated this is the result of systemic racism on the part of judges, juries and police officers, a closer look at where the differences occur has long revealed a critical distinction. With some variation, overall, whites and other racial groups have nearly identical arrest and conviction rates for crimes involving integrity while some non-white groups (African-American and Hispanic) tend to have significantly higher rates for crimes of violence (4). The largest variations tend to occur when one looks at age (older = lower) and most significantly, gender (women = lower). This difference in the conviction rates based on type of crime should be articulated by any employer concerned about Workplace Violence, Excessive Force or Domestic Violence.

Compliance Issues

The easiest way to comply with the new Guidelines would be to simply stop soliciting any information regarding criminal conduct: no application, polygraph or interview questions, no record or social or other media checks and no questions of character references about criminal convictions or commissions. If, inadvertently, the applicant revealed such information or it was discovered in an employment record file, it should be ignored. In this manner, in theory at least, there would be no practice or policy that would have disparate impact based upon criminal conduct. Under this approach, applicants who missed work or were late for assignments because they had to comply with the terms of their parole would simply be disqualified or dismissed because of excessive absenteeism or tardiness without ever considering “why” or mitigating

circumstances. Of course, to follow this approach, employers might have to ignore a number of laws regarding Domestic Violence, the possession of firearms and POST certification requirements. When these conflicts were pointed out to the EEOC by the International Personnel Management Association and other employer groups during the hearing phase prior to the Guidelines being issued, they went unaddressed presumably because federal law trumps state law. The EEOC, however, does acknowledge the federal prohibition regarding firearm possession and Domestic Violence convictions which clearly would apply to any job where the possession of firearms was essential (5).

The reality is that both public and private employers are truly concerned about who they hire and these concerns extend beyond the basic skills, knowledge, experience and ability requirements applicants must have for the job. Even the federal Office of Personnel Management considers integrity to be a competency on a par with all other competencies. Therefore, whether the organization is concerned about integrity, violence or a drug free workplace, evaluation of criminal conduct is both desirable and necessary. Finally, employers wishing to escape the frying pan of EEOC disparate impact litigation might find themselves in the fire of negligent hiring claims should they fail to evaluate all past criminal conduct.

Creating Qualifiers/Disqualifiers For Criminal Conduct

Not everything about the new guidelines is misplaced. The discussion about limiting the period of accountability for criminal activity is certainly something that I have written about and advocated since at least 1979 (6). While there will always be some absolute or forever disqualifiers, most information targets should have uniform and consistent Periods of Accountability. These Periods should consider likely changes in social development (adolescence to maturity) but avoid variable or sliding time bars such as “Since you were 18...” or “Since you were 21...”. While this approach excuses what for most people are the typical excesses and anti-authoritarian behaviors of youth, they result in unequal treatment for older applicants some of whom may be protected by the Age in Employment Discrimination Act. Thus, if the employer were to apply the “Since you were 21...” standard to a 22 year old applicant, that applicant would only be accountable for activities in the preceding year. The same terminology, however, results in a very different (unequal) standard for a 42 year old applicant – a far more severe 21 year Period of Accountability. In addition, one should also consider the time elapsed since the last occurrence. While it would be nice to base this on solid probabilities of recidivism, few statistics exist based on specific crimes. Further exacerbating this calculation is the reality that many states have over 1,000 defined crimes in their criminal or penal codes. In 1970, the Code of Federal Regulations had 54,000 pages. By December of 2011, it had 165,000 pages. Legal experts estimate the number of federal regulations now linked to criminal statutes at anywhere between 10,000 and 300,000 (7). All this means, of course, that today employers are far more likely to encounter applicants with criminal histories if for no other reason than there are far more crimes on the books than even a generation ago. While anecdotally it may still be true that a person convicted of a homicide did, in fact, only commit a single homicide and a person convicted of a single drug sale was, in fact, responsible for many other drug sales, most recidivism rates only apply to a more generalized criminal arrest/conviction rates, not crime specific

probability rates. Federal, state and local law enforcement agencies who have adopted the procedures taught in the Objective Pre-employment Interviewing course (8) report 3 to 5 years for less serious and 7 to 10 years for more serious activities to be practical Periods of Accountability for most criminal and other counterproductive behaviors. Thus minor speeding violations would be considered within the last 3 or 5 years and serious Hit-and-Run violations in the last 7 or 10 years. The EEOC cites the 7 year accountability period contained in the Fair Credit Reporting Act as a possible guideline and further cites several studies that appear to show that previously convicted individuals' recidivism rates correspond to those of individuals never convicted after 6 or 7 years (8). Unfortunately, these findings may simply be the result of normal changes in emotional maturity since they primarily compare juvenile and adult criminal conviction records.

Once the Periods of Accountability have been established, the employer should then consider frequency and/or quantity in creating uniform standards. "How many serious, undetected crimes in the last 7 years" before the applicant is disqualified usually means one or more felony commissions or convictions while theft from job admissions exceeding \$100 in the last 3 years (not how many times, but how much in dollars) is often used to create an integrity disqualification standard based upon work related theft. Finally, employers should always consider the circumstances surrounding criminal conduct, what the EEOC calls "individualized assessment" with the possibility of making exceptions to the disqualification standards. However, such assessments should not be made casually either for or against the applicant. Even a superficial review of current criminal justice practices indicates that conviction records are almost always pleas that greatly underestimate actual criminal conduct. Since it is the recent past criminal act that predicts the recent future criminal act, employers should be less concerned about trying to make criminal justice terms such as diversion, deferment and *nolo contendere* fit the pre-employment arena than finding out what the applicant actually did. Also, if exceptions to the standards are made for one "individualized assessment", all future applicants with the same set of circumstances must be granted the same exception. In effect, the disqualification standards have been changed and it is critical that employers keep track of such changes so they can be applied uniformly. For this reason, individual interviewers, polygraph examiners and background investigators should not be allowed to grant exceptions for the interviews, polygraph examinations and background investigations they themselves conduct but rather petition a specified administrator ("Oracle") who can ensure the left and the right hand continue to be consistent with regard to the application of the standards.

Proving Business Necessity

Since all evaluations of criminal conduct have both a gender and racial disparate impact, employers are required at their time and expense to prove Business Necessity and, in some cases, the lack of an alternative with less disparate impact. Business Necessity applies to all types of employers, public and private, and refers to things that are critical to the existence of the organization, not operational efficiencies or profit in the private business sense of the term.

The simplest and least expensive way employers can demonstrate Business Necessity is to cite a federal statute that supercedes Title VII. There are numerous occupations (law enforcement, port work, private prisoner transportation, contact with Indian children, etc.) that require federal licenses that in turn prohibit individuals convicted of various felonies and misdemeanors from obtaining the required licenses. In short, no license means no job. In some cases where the use of firearms is a Business Necessity, convictions for felony or misdemeanor Domestic Violence would become an automatic disqualifier for even state and local law enforcement jobs. The EEOC, however, is quick to point out that state and local laws (Police Officer Standards/Training or Commissions of Law Enforcement Officer Standards/Education) do not supercede Title VII mandates. Also, there are various crimes (treason, inciting riots, federal drug offenses, etc.) that preclude federal employment but some of the crimes cited have limited Periods of Accountability. There are numerous other jobs and programs that are subject to federally imposed restrictions based on criminal convictions including, but by no means limited to, the business of insurance, employee benefits, Medicare and some state health care programs, defense contracting, prisoner transportation, commercial motor vehicle licenses, locomotive licenses, pilot/flight instructor licenses, stock and bond brokers, commodity dealers, investment advisors, customs brokers, arms and other exporters, merchant mariners, farm labor contractors, and grain inspectors. While it may appear that anyone connected with a good lobbyist had themselves statutorily exempted from Title VII, one should never forget that convictions only involve individuals who were caught and pled to what their conviction records indicate. If one truly is interested in predicting future, performance related conduct, the focus should always be on what the individual did, how long ago, how often and under what circumstances. Also, many federal employers and subcontractors must abide by various Presidential Executive Orders that often appear to contradict the federal statutory exemptions and would have to be resolved in litigation.

Any employer whose employees testify in court or any form of administrative or licensing proceeding should always consider arguing that being a credible witness is a Business Necessity and that even criminal conduct that happened long ago is used to discredit witnesses. Both Prosecutors and Defense Attorneys are well known to attack witness credibility by inferences that have no basis in fact, let alone a criminal record. Further, once discredited, said employees can neither be dismissed (they met the hiring standards) nor ever used again in the capacity for which they were hired. Unfortunately, this argument only applies when testifying is not merely possible but certain on a regular basis, an employment condition true for peace officers but unusual for support staff.

There are sometimes experiential “proofs” of Business Necessity and can be presented as face validity justifications for disqualifications based upon criminal histories. For example, if an employer had been sued and failed to prevail over an incident involving Excessive Force or Workplace Violence, such an employer may apply this documented experience to argue the need to screen out applicants who were convicted or admit to crimes of violence. In some instances, this same argument might be attempted when it is generally accepted to be true of the profession or industry even if a specific incident has never occurred at the employer in question. Thus, since many but not all law

enforcement agencies have to deal with allegations of Excessive Force, even if a particular police department has never been sued for Excessive Force, they might argue that such occurrences are common enough within the profession of police to justify screening out applicants with commissions or convictions for violence.

Empirical “proofs” of Business Necessity start with citing accepted research published in peer review journals, e.g. certain levels of alcohol and other drug use negatively effect hand-eye coordination, sound judgment, etc. and link them to position related tasks that have been established as Essential Functions (ADA/ADAAA) or Bona Fide Occupational Qualifications (Title VII).

Controlled group studies, including before-and-after studies, are sometimes used to demonstrate Business Necessity but only for skills, knowledge, abilities and experience – not criminal conduct. Thus comparing the work related performance of applicants who were found to be truthful on polygraph examinations when they denied serious criminal activity in the last seven years to applicants who admitted to serious criminal activity or were reported as untruthful when they denied criminal activity within the last seven years would almost certainly result in a finding of Negligent Hiring against the employer. In fact, the whole issue of limiting the Period of Accountability has never been tested with regard to the concept of Negligent Hiring so some employer following the new EEOC Guidelines regarding criminal conduct will most certainly be a test case.

Less Disparate Alternative

If an applicant who is negatively effected by an employer’s practice or policy demonstrated to have a disparate impact can show an alternative practice or policy with significantly less disparate impact, the employer who refuses to adopt the alternative might be found to be in violation of Title VII. While all males and particularly African-American and Hispanic males can easily demonstrate that they are negative effected by any measure of criminal conduct, I am not aware of any alternative that evaluates the same conduct and has less disparate impact. There are validated paper-and-pencil psychological integrity tests such as the Reid Report that statistically show no racial disparity but, as discussed previously, measure honesty and do not claim the evaluate all work related criminal activity and, specifically, are not validated to measure acts of violence such as assault, battery, Domestic Violence or homicide – on or off the job. Also, if individualized assessments are to be part of the new EEOC focus, assessments tools that rely solely on statistical population analysis might face additional problems that one-on-one interviews and polygraph examinations should be able to avoid.

It is important to remember that the new EEOC Guidelines regarding criminal conduct do not include any new regulations or laws but rather attempt to make employers more liable for disqualifications based upon criminal activity. It is clear that the EEOC is aware of entire categories of employers that are statutorily exempt from these Guidelines and it can be expected that categorical proofs of Business Necessity will eventually evolve in case law. Until such time, however, employers are best advised to formalize criminal conduct disqualifiers and prepare Business Necessity defenses that demonstrate this information target to be relevant to organizational purpose and work performance.

In the short run, however, any employer whose employees testify in court or any form of licensing or administrative proceeding should always consider arguing that being a credible witness is a Business Necessity where even criminal activities that happened long ago are used to discredit employer witnesses. Further, once discredited, such an employee can neither be dismissed nor ever used in a testimonial fashion again since it quickly becomes common knowledge to all interested parties. Unfortunately, while this argument only applies for situations where the employee's testimony is common place and not a mere possibility, it most certainly would be true for any practicing peace officer.

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