

# COMPLIANCE OVERVIEW

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## EEOC Guidance on Employers' Use of Arrest and Conviction Records

Under Title VII of the Civil Rights Act of 1964 (Title VII), employers that use information about employees' or applicants' criminal histories in their employment decisions must ensure that the use does not result in discrimination based on race, sex, religion, color or national origin.

Disparate treatment discrimination and disparate impact discrimination are both prohibited practices under Title VII. The Equal Employment Opportunity Commission (EEOC), which enforces Title VII, has provided guidance to help employers avoid Title VII violations when using arrest or conviction records for employment screening.

This Compliance Overview provides a general summary of the EEOC's guidance and includes best practice recommendations for employers. Best practices include having a written screening policy and inquiring about criminal records only if they are relevant to the position in question.

### HIGHLIGHTS

#### DISPARATE TREATMENT

- Treating criminal history information differently for different applicants or employees based on their race, sex, religion, color or national origin.

#### DISPARATE IMPACT

- Adopting a neutral policy or practice regarding criminal history use that disproportionately impacts protected individuals and is not job related or consistent with business necessity.

### LINKS AND RESOURCES

- Text of the EEOC's [Enforcement Guidance](#) for Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII
- [General information](#) about pre-employment inquiries and arrest and conviction
- [Questions and Answers](#) about the EEOC's enforcement guidance

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.



## CRIMINAL HISTORY DISCRIMINATION OVERVIEW

Title VII prohibits employers from discriminating against employees or applicants based on race, sex, religion, color or national origin. It does not prohibit employers from using arrest and conviction records in their employment decisions. However, certain uses of these records may constitute prohibited discrimination under the law.

The EEOC uses two analytic frameworks to determine whether an employer's use of criminal history information violates Title VII. The first framework examines whether the employer's use results in "disparate treatment" of an individual based on his or her race, sex, religion, color or national origin. The second framework examines whether an employer's policy or practice relating to criminal records has a "disparate impact" on Title VII-protected groups. Under both frameworks, the EEOC's guidance generally focuses on race and national origin discrimination.

## DISPARATE TREATMENT DISCRIMINATION

Disparate treatment discrimination occurs when an employer uses arrest and conviction records to treat individuals who have similar criminal histories differently because of their race, national origin or other protected status. For example, if two applicants of different races or national origins have comparable criminal histories, the employer may violate Title VII if it uses the criminal history information to exclude one of them from employment but not the other.

Several types of evidence may establish that race, national origin or other protected characteristics motivated an employer's use of criminal records in a selection decision. The EEOC's guidance outlines the following examples of evidence that may support a disparate treatment discrimination charge:

- **Biased statements:** Comments by the employer or decision-maker that are derogatory toward the charging party's protected group, or that express group-related stereotypes about criminality.
- **Inconsistencies in the hiring process:** Evidence that the employer requested criminal history information more often for individuals with certain racial or ethnic backgrounds, or gave one group but not another the opportunity to explain their criminal histories.
- **Similarly situated comparators** (individuals who are similar to the charging party in relevant respects, except for membership in the protected group): Comparators may include people in similar positions, former employees and people chosen for a position over the charging party. The fact that a charging party was treated differently than individuals who are not in the charging party's protected group by, for example, being subjected to more or different criminal background checks or to different standards for evaluating criminal history, would be evidence of disparate treatment.
- **Employment testing:** Matched-pair testing may reveal that candidates are being treated differently because of a protected status.

- **Statistical evidence:** Statistical analysis derived from an examination of the employer's applicant data, workforce data or third-party criminal background history data may help to determine if the employer counts criminal history information more heavily against members of a protected group.

## DISPARATE IMPACT DISCRIMINATION

Disparate impact discrimination occurs when an employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group. However, employers are not prohibited from using criminal history information to exclude individuals from employment if the use is **job related** for the position in question and consistent with **business necessity**.

### *Identifying the Policy or Practice*

A disparate impact analysis begins with the employer's policy or practice that a charging party alleges to be discriminatory. This may include the text of the policy or practice, any associated documentation and any information about how the policy or practice was actually implemented. From this evidence, the EEOC may examine:

- Which offenses or classes of offenses were reported to the employer (for example, all felonies or all drug offenses);
- Whether convictions (including sealed or expunged convictions), arrests, charges or other criminal incidents were reported;
- How far back in time the reports reached; and
- The jobs for which the criminal background screening was conducted.

### *Determining Disparate Impact*

The central question in a disparate impact claim is whether a disproportionate number of Title VII-protected individuals have been deprived of employment opportunities. The fact that an employer has a racially balanced workforce is not enough to disprove disparate impact. To determine disparate impact, the EEOC may examine statistical information about the local workforce and demographics, along with any other relevant data.

### *Proving Job Relation and Business Necessity*

Once a charging party establishes disparate impact, the employer may prove that its policy or practice was not discriminatory by showing that it is necessary for the safe and efficient performance of a particular job. This requires the employer to link specific criminal conduct with the inherent risks of a job position.

Because arrest records do not prove that an individual engaged in criminal conduct, employers may not rely on them alone to exclude an individual from employment. Employers may, however, use arrest

records to determine whether the conduct underlying an arrest would justify excluding an individual from employment. Conviction records, on the other hand, are generally accepted as proof of criminal conduct.

To prove that the use of criminal records is job related and consistent with business necessity, an employer must show that its policy or practice includes consideration of at least the following three factors:

- The nature of the crime;
- The time elapsed; and
- The nature of the job.

Under most circumstances, an employer must also show that it provided an opportunity for an individualized assessment to anyone excluded by its policy or practice. An individualized assessment consists of:

- Notice to the individual that he or she has been screened out due to criminal history;
- An opportunity for the individual to demonstrate that the exclusion should not be applied due to his or her particular circumstances; and
- The employer's consideration of whether the additional information warrants an exception to the policy or practice.

## **EEOC'S BEST PRACTICES FOR USING CRIMINAL RECORDS**

The following are some examples of best practices that the EEOC recommends for employers that use criminal history information when making employment decisions.

### ***Develop a Policy***

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct;
- Identify essential job requirements and the actual circumstances under which the jobs are performed;
- Determine the specific offenses that may demonstrate unfitness for performing such jobs;
- Identify the criminal offenses based on all available evidence;
- Determine the duration of exclusions for criminal conduct based on all available evidence;
- Include an individualized assessment;
- Record the justification for the policy and the procedures;

- Note and keep a record of consultations and research considered in crafting the policy and procedures; and
- Train managers, hiring officials and decision-makers on how to implement the policy and procedures consistent with Title VII.

### ***Limit Inquiries***

When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.

### ***Confidentiality***

Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.