

When Can New Jersey Employers Use Arrest Records to Screen Applicants?

by Ramon Rivera on May 8, 2012

New Jersey employers often use a number of tools and techniques to screen job applicants. Among the most common, a recent survey found that 92 percent of employers conduct criminal background checks on some or all of their job applicants. While it is important to find the best employees for your business, it is equally important to make sure you don't violate any federal or New Jersey labor laws in the process.

The U.S. Equal Employment Opportunity Commission (EEOC) recently issued updated Enforcement Guidance on the proper use of arrest and conviction records by employers in employment decisions under Title VII of the Civil Rights Act of 1964 (Title VII). While Title VII does not prohibit an employer from requiring applicants or employees to provide information about arrests, convictions or incarceration, it is unlawful to discriminate in employment based on race, color, national origin, religion, or sex. Thus, the use of arrest and conviction records in employment decisions may violate Title VII in some cases.

As detailed by the EEOC, the guidance does not create new policy. Rather, it incorporates recent judicial decisions, updates relevant data, consolidates previous EEOC policy statements on this issue into a single document, and illustrates how Title VII applies to various scenarios that an employer might encounter.

Below are several key takeaways from the new guidance.

1. Even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that action taken is "job related and consistent with business necessity" for the position in question, the exclusion may violate Title VII.

2. The EEOC details two circumstances in which employers may consistently meet the "job related and consistent with business necessity" defense:

- The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job. The employer's policy then provides an opportunity for an individualized assessment for those people

identified by the screen, to determine if the policy as applied is job related and consistent with business necessity.

3. A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII. However, federal laws and regulations that restrict or prohibit employing individuals with certain criminal records will provide a defense to a Title VII claim.

Lastly, it is important to note that other laws may be implicated by employee criminal background checks. For example, the Fair Credit Reporting Act establishes several procedures that employers must follow when they obtain criminal history information from third-party consumer reporting agencies.

To make sure that your applicant screening measures comply with the new guidance, please contact me or any other member of Scarinci Hollenbeck's Labor and Employment Law Group.