

EEOC UPDATES POLICY ON CRIMINAL BACKGROUND CHECKS

By Matthew Schwarzfeld, Council of State Governments Justice Center

Earlier this week, the Equal Employment Opportunity Commission (EEOC) issued updated enforcement guidance on employers' use of arrest and conviction records when making employment decisions. In its [guidance](#), the EEOC cited that hiring policies that include blanket exclusions of people with criminal records have a disparate racial impact, and therefore [violate Title VII of the 1964 Civil Rights Act](#).

The new rules call for employers to assess applicants on an individual basis rather than excluding everyone with a criminal record through a blanket policy. The guideline states that employers should not reject a candidate because of an arrest without a conviction, as "arrests are not proof of criminal conduct." The new guidance doesn't prohibit the use of criminal background checks. Rather, it urges employers to consider the "nature of the crime, the time elapsed, and the nature of the job" both in writing a hiring policy and in making a specific hiring decision.

EEOC's commissioners decided to issue the updated guidance in a bipartisan 4-1 vote. The new guidance supersedes the EEOC's previous position on the issue of criminal background checks, released in 1987. While confirming the core principles of the earlier policy, this guidance provides significantly more detail and direction for employers. In nearly 60 pages, the EEOC recommends "best practices" for employers, provides a dozen examples that clarify the standards, and [answers frequently asked questions](#).

"The new guidance clarifies and updates the EEOC's longstanding policy concerning the use of arrest and conviction records in employment, which will assist job seekers, employees, employers, and many other agency stakeholders," said EEOC Chair Jacqueline Berrien, in a statement.

In its guidance, the EEOC cites extensive social science research and case law supporting the finding that blanket exclusions of people with criminal records violate Title VII. Specifically, the commission cites data indicating that about one in 17 white men are expected to serve time in prison during their lifetime, compared with one in six Hispanic men, and one in three African-American men.

"The ability of African-Americans and Hispanics to gain employment after prison is one of the paramount civil justice issues of our time," said Stuart Ishimaru, one of the five members of the commission, when announcing the new standard.

The EEOC is the federal agency that enforces the nation's laws against employment discrimination. Though it provides guidance, it is not a regulatory agency. Therefore, judges hearing employment discrimination cases have discretion whether or not to defer to EEOC guidance. The judge in a 2007 district court case on whether policies that prohibit hiring individuals with criminal convictions discriminate on the basis of race [[Ei v. SEPTA, 479 F.3d 232 \(3d Cir. 2007\)](#)] wrote that EEOC's 1987 ruling didn't provide sufficient research support, and therefore chose not to defer to it.

"The research is really important to this updated policy. It gives heft to the whole thing. That's why half the document is footnotes. For courts to take the issue of disparate impact seriously, the argument has to be very well reasoned and thoughtful, which in this case it really is. This is clearly a very significant step by the EEOC," said Maurice Emsellem, Policy Co-Director with the National Employment Law Project (NELP). (To view NELP's highlights of the EEOC's guidance, [click here](#).)

Unlike the old policy, the new guidance also provides specific recommendations for how employer criminal record policies should be designed to comply with Title VII. For example, because criminal background checks have a disparate impact on people of color, the EEOC states that employers must show that the screening process is “job related” and consistent with “business necessity.” Specifically, this means that employers must consider the age of the offense, the seriousness of the offense, and its relation to the job in question.

The new policy also urges employers to give applicants a chance to explain their criminal record before they are rejected outright. An applicant might say the report is inaccurate, the conviction was expunged, that he or she has been fully rehabilitated, or that the conviction is unrelated to the job he/she is applying for.

The policy also makes clear how Title VII interacts with other local and state laws. It specifies that federal laws like Title VII generally preempt state laws (and that the Supreme Court has upheld the fact that Title VII does this), and that legislators cannot enact overly broad state and local laws that restrict employment of people with criminal records—as they would then be in violation of Title VII.

“This guidance is doing something very similar to what the Attorney General has been doing on reentry issues,” Emsellem said, referring to the Attorney General's [Federal Interagency Reentry Council](#) and recent guidance from the HUD Director on [public housing access for ex-offenders](#) and other issues. “It’s saying, ‘Look at your laws, and make sure they’re consistent with federal law.’”

This ruling comes at an important moment in the discussion around employer’s use of criminal background checks. According to a [2010 survey](#) by the Society for Human Resources Management, 92 percent of employers conduct criminal background checks on some or all job applicants, up from 51 percent in 1996. More than two-thirds of states allow hiring and professional-licensing decisions to be made on the basis of an arrest alone.

EEOC has been considering the issue of the disparate racial impact of criminal background checks for several years. Many observers called for an updated policy, citing the fact that at the time of its last ruling, the Internet—and online background check companies, now part of a multi-billion dollar industry—barely existed. In a [public hearing on the issue last July](#), the commission received approximately 300 public comments from prominent organizations, including the NAACP, the U.S. Chamber of Commerce, the Society for Human Resources Management, the Leadership Conference on Civil and Human Rights, and others.

The EEOC has also recently stepped up its enforcement efforts. It recently publicly [settled with Pepsi](#) over the beverage company’s use of a blanket exclusion policy. The commission’s enforcement wing is also currently investigating more than 100 claims of job discrimination based on criminal background checks.

To learn more about this important development and how it will impact different stakeholders, listen to this [press event](#) (sponsored by NELP), which includes Chris Owens, NELP’s executive director; Hilary Shelton, Washington Bureau Director and Senior Vice President for Advocacy, NAACP; Sharon Dietrich, Managing Attorney for Public Benefits and Employment, Community Legal Services of Philadelphia; Fernán Cepero, Vice President of Human Resources, YMCA of Greater Rochester; Glenn Martin, Vice President of Development and Public Affairs, Fortune Society; and Elsie Sacarello Quiles, a 56-year old mother of four from Marietta, Georgia.