

Employment Screening and Criminal Records: Pitfalls and Best Practices

Tanisha Wilburn
Senior Attorney Advisor
U.S. Equal Employment Opportunity Commission
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BACKGROUND

- **April 25, 2012 EEOC Enforcement Guidance:**
Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 , as amended
 - http://eoc.gov/laws/guidance/upload/arrest_conviction.pdf
- **May 25, 2012 DOL Training and Employment Guidance Letter:** *Update on Complying with Nondiscrimination Provisions: Criminal Record Restrictions and Disparate Impact Based on Race and National Origin*
 - http://wdr.doleta.gov/directives/attach/TEGL/TEGL_31_11.PDF

FEDERAL NONDISCRIMINATION LAWS

- **Title VII of the Civil Rights Act of 1964, as amended**
 - Prohibits employment discrimination based on race, color, religion, sex, or national origin by employers with 15 or more employees, employment agencies, and federal, state, or local governments
- **Title VI of the Civil Rights Act of 1964**
 - Prohibits discrimination based on race, color, or national origin by recipients of federal financial assistance
- **Workforce Investment Act of 1998**
 - Prohibits discrimination based on race, color, religion, sex, national origin, age, disability, or political affiliation or belief by recipients of federal financial assistance under the Act
- **Wagner-Peyser Act of 1933, as amended**
 - Prohibits discrimination based on race, color, religion, sex, national origin, age, disability, or political affiliation or belief by recipients of federal financial assistance under the Act

WHY IS THIS AN ISSUE FOR THE EEOC?

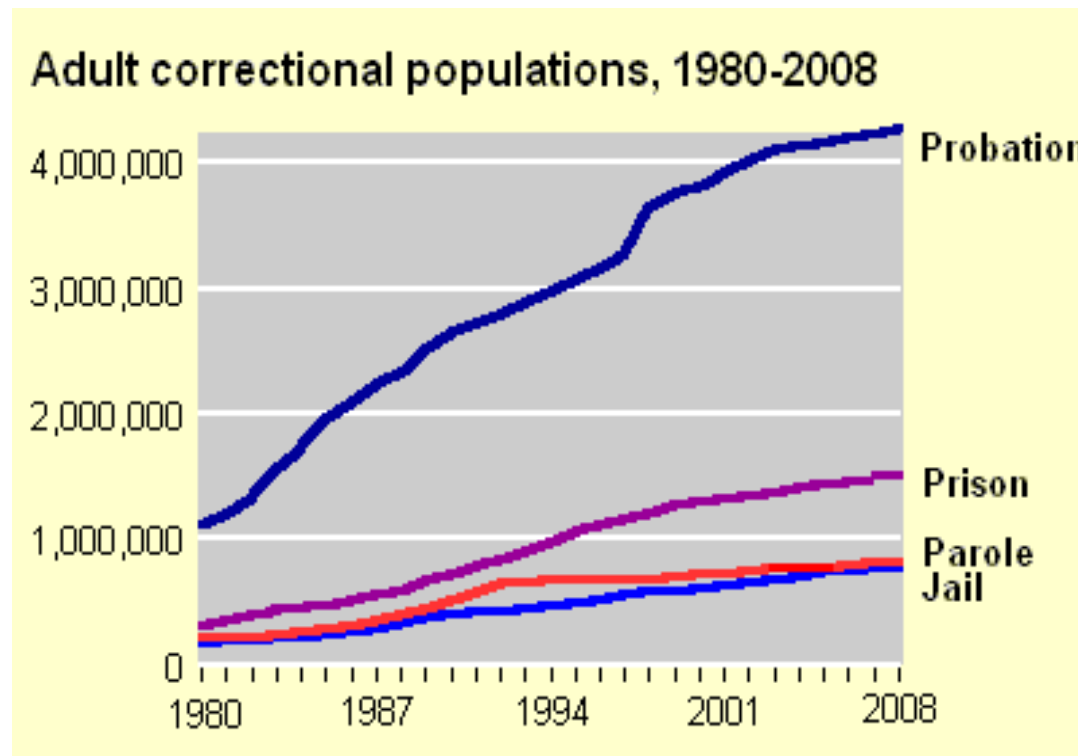
Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination based on race, color, religion, sex, or national origin.



INCREASING PREVALENCE IN USING CRIMINAL RECORDS AS AN EMPLOYMENT SCREENING TOOL

- Criminal records have become readily available and inexpensive over the past twenty years. This makes them attractive as a screening tool for employers and other entities that hire or refer individuals for employment.
 - **Goal:** Protecting other employees, property, assets, & reputation
 - **87%** of companies report using background checks for hiring decisions
- There are over **70 million** criminal records in the state repositories
 - Arrest records, criminal citations, convictions, warrants, etc.
 - Many of these records are inaccurate and/or incomplete
- As the popularity of criminal background checks grows, so too does the overall percentage of Americans with criminal backgrounds.

CORRECTIONS POPULATION HAS STEADILY INCREASED



Source: Bureau of Justice Statistics Correctional Surveys (The Annual Probation Survey, National Prisoner Statistics Program, Annual Survey of Jails, and Annual Parole Survey) as presented in Correctional [Populations in the United States, annual](#), [Prisoners in 2008](#), and [Probation and Parole in the United States, 2008](#).

THE NUMBERS. . . .

- As of 2009, more than **7.3 million adults** have had some contact with the criminal justice system – this includes probationers, parolees, prisoners, and jail inmates
- In 2008, **ex-prisoners** made up **1 in 33** of working-aged adults; **ex-felons** made up **1 in 15** working-aged adults
- Black and Hispanic males are overrepresented in the corrections population as compared to White males
 - **1 in 12** Black males are incarcerated;
 - **1 in 36** Hispanic males are incarcerated;
 - **1 in 87** White males incarcerated.

MYTH #1

- **Myth:** The EEOC Guidance **prohibits** covered entities from obtaining or using criminal records to screen its applicants and/or employees.
- **Fact:** The EEOC Guidance **does not prohibit** covered entities from obtaining or using criminal records to screen its applicants and/or employees.

MYTH #2

- **Myth:** The EEOC Guidance **requires** covered entities to **hire or refer** individuals with criminal records who are unsuitable for certain jobs.
- **Fact:** The EEOC Guidance **does not** require covered entities to hire or refer anyone. The Guidance **does** advise covered entities how they can avoid Title VII liability if they use applicants' or employees' criminal records to make employment decisions.

MYTH #3

- **Myth:** The EEOC Guidance imposes “new” Title VII requirements on covered entities.
- **Fact:** Applying Title VII analysis to the use of criminal records in employment decisions is well-established.
 - **1969:** The EEOC began resolving charges involving the use of criminal records in employment decisions.
 - **1970s:** Federal courts began analyzing this issue using Title VII analysis.
 - **1987, 1990:** The EEOC issued three policy statements on this issue explaining the Title VII analysis.

ARREST RECORDS

- **Remember the three “I”s:** Arrest records are unreliable because:
 - **Innocent** until proven guilty principle: Not proof of criminal conduct; merely an allegation.
 - **Incomplete**: Many records lack the details on what happened post-arrest.
 - **Inaccurate**: Many records report arrests for the wrong person (mistaken identity); others continue to report records that were sealed or expunged.
- When using arrest records as a screening tool, consider whether **(1)** the **conduct** relates to the job; and whether **(2)** the **conduct** makes the individual **unsuitable** for the job.

CONVICTION RECORDS

- More reliable than arrest records **but**, covered entities should still be cautious before using them to make employment decisions because:
 - **Inaccurate records**: Databases continue to report records that were expunged or sealed; mistaken identity.
 - **Outdated records**: Databases continue to report offenses that were downgraded (felony vs. misdemeanor) or dismissed.

JOB ANNOUNCEMENTS

- What should covered entities say about **criminal records** in **job announcements**?
- ***Do:**
 - Inform applicants that they may be subject to a criminal background check, but that having a criminal record will not automatically eliminate them from consideration for a job.
- **Don't:** Include announcements with the following language:
 - “No criminal background”
 - “Have no criminal history”
 - “CLEAN criminal background (NO felonies or misdemeanors)”
 - “No felons!”
 - “No arrest records!”
- See **42 U.S.C. 2000e-3(b)** (employment agency job postings)

JOB APPLICATIONS

- When should covered entities **ask** about **criminal records**?
- **Best Practice**: **Later** in the selection process (e.g., after selecting a person for an interview, after a conditional job offer, etc.); preferably, not on the job application.
 - **Why?**
 - Helps to reduce the chilling effect on applicants/employees
 - Helps covered entities to objectively assess the relevance of the person's criminal record

COMPLIANCE WITH FEDERAL LAWS AND/OR REGULATIONS

- In several industries, federal statutory and/or regulatory requirements restrict or prohibit employing individuals with certain criminal records.
- **Compliance with these federal laws and/or regulations is a defense to Title VII liability.**
- However, if a covered entity imposes requirements that **go beyond** the federally-imposed restriction, **the discretionary aspect** of the requirement would be subject to Title VII liability.

COMPLIANCE WITH STATE OR LOCAL LAWS OR REGULATIONS

- States and local jurisdictions also restrict or prohibit employing individuals with certain criminal records.
- Title VII **preempts** these requirements if they require covered entities to engage in discriminatory practices. **42 U.S.C. § 2000e-7.**
- Therefore, compliance with state or local criminal conduct exclusions **will not shield covered entities from Title VII liability** *if* it means violating Title VII.

DISPARATE TREATMENT DISCRIMINATION

- **Definition:** Treating applicants/employees differently because of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a), (b).

▫ **Do:**

- **Hire** or **refer** individuals based on their **suitability** for the job in question.

▫ **Don't:**

- **Reject** Black or Hispanic applicants because of their criminal records, but **hire** or **refer** White applicants with similar criminal records and job qualifications;
- **Reject** Black or Hispanic applicants **based on** racial or ethnic **stereotypes about criminality**; or
- **Prohibit** Black or Hispanic applicants from explaining their criminal history but **allow** White applicants to explain theirs.

THE MARK OF A CRIMINAL RECORD

Black applicant, no criminal record. (14%)	White applicant, no criminal record. (34%)
Black applicant, criminal record. (5%)	White applicant, criminal record. (17%)

- Individuals applied in person for entry-level jobs in the Milwaukee area
- Resumes indicated that they had served time for a drug offense; but had the same job qualifications
- **Outcome of interest:** Who received a callback for an interview?

Conclusion:

- Blacks with criminal records treated less favorably than similarly situated Whites.
- Blacks with no criminal records treated less favorably than Whites **with a criminal record**

DISPARATE IMPACT DISCRIMINATION

- **Definition:** A **neutral** policy or practice that **disproportionately screens out** or **disadvantages** Title VII-protected individuals **and** does not relate to the job in question and is not consistent with a business necessity.
42 U.S.C. § 2000e-2(k).
- Examples of neutral criminal record screening/exclusion policies that may have a **disparate impact** on protected individuals:
 - Posting job announcements that categorically exclude people who have any kind of arrest or conviction record;
 - Screening out applicants with criminal records by not referring them to employers who have stated that they will only accept applicants with “clean” or “clear” criminal records.

IS THE POLICY OR PRACTICE JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY?

- The Commission believes there are **two circumstances** in which covered entities will **consistently** meet the “job related and consistent with business necessity” standard.
 - **(1)** By **validating** the policy under the **Uniform Guidelines on Employee Selection Procedures** if relevant data is available and validation is possible. 29 C.F.R. part 1607.
 - **(2)** By developing a **targeted screen** that is supplemented by an **individualized assessment** process.

WHAT IS A "TARGETED SCREEN"?

- Established by *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977).
- Screening policies or practices that consider at least **three factors**:
 - **(1)** The nature and gravity of the offense or conduct;
 - **(2)** The time elapsed since the offense, conduct, and/or completion of the sentence occurred; and
 - **(3)** The position held or sought.

TARGETED SCREEN:

#1 THE NATURE AND GRAVITY OF THE OFFENSE OR CONDUCT

- **What happened and how serious was it?**
 - **Do:**
 - Consider the **type** of criminal record (e.g., pending charge? arrest? conviction?)
 - Consider the **type** of offense (theft crime vs. drug crime vs. violent crime?)
 - Consider the severity of the offense (misdemeanor v. felony? fine vs. probation vs. imprisonment?)
 - **Don't:**
 - Automatically exclude everyone with a criminal record – rarely justified and closely scrutinized

TARGETED SCREEN:

2 TIME ELAPSED SINCE THE OFFENSE OR CONDUCT OCCURRED

- **How long ago did the person commit the offense? How long ago was the person released from prison or jail?**
 - **No magic number!** The Commission did not tell covered entities to adopt a specific duration for exclusions (e.g., 6 mos., 1 year, 5 years).
 - **Do:**
 - Consider any objective information or research to determine how long people with criminal records should be excluded from certain positions (e.g., recidivism research)
 - **Don't**
 - Adopt lifetime bans or “forever rules” that permanently exclude individuals with criminal records – rarely justified and closely scrutinized

TARGETED SCREEN:

#3 THE NATURE OF THE JOB HELD OR SOUGHT

- **What is the job and who is affected by it?**
 - **Do:** tailor exclusions based on the job(s) in question
 - Does the person pose an **increased risk** based on the job's **duties/responsibilities** (e.g., job involves access to valuables; vulnerable individuals)?
 - Does the person pose an **increased risk** based on the **environment** the job will be performed in (e.g., private home vs. a warehouse vs. outdoors)?
 - **Don't:** exclude people from a range of jobs that are unrelated to their criminal offenses

EXAMPLE #1

- ABC Job Bank refers job applicants to various jobs in the local community which may range from warehouse jobs, to delivery work, to administrative positions.
- As part of its referral process, ABC directs applicants to complete a general application online. All applicants must answer certain questions before they are permitted to submit their online application, including “have you ever been convicted of a crime?”
- If the applicant answers “yes,” the online application process automatically terminates, and the applicant sees a screen that simply says “Thank you for your interest. We cannot continue to process your application at this time.”

EXAMPLE #1, CONT'D

- **Q:** Is ABC's application/referral process problematic under federal nondiscrimination laws?

- **A:** Yes.
 - The policy likely has a **disparate impact** based on race or national origin;
 - Based on national statistics, Black and Hispanic applicants are more likely to be excluded from this application process.
 - The policy cannot be justified **as job related and consistent with business necessity**
 - **Blanket exclusion** – no consideration of the three *Green* factors (i.e., the targeted screen)
 - No consideration of the **nature/gravity** of the convictions – all convictions do not pose the same risks
 - No **time limitation** – this is a “forever rule”
 - No attempt to **tailor the exclusions** to the **type of job** involved – range of jobs can vary; risks are not the same in all jobs

EXAMPLE #2

- “We Shred” provides shredding services for area businesses that includes picking up discarded files and sensitive materials from offices and transporting the materials to the company’s facility so that they can be shredded and recycled.
- The company adopted a policy prohibiting anyone who has been convicted of a crime related to theft or fraud in the past five years from working for the company.
- **Q:** If this policy were challenged as discriminatory under Title VII (e.g., disparate impact based on race or national origin), would it satisfy the business necessity standard?

EXAMPLE #2, CONT'D

- **A: Maybe.** The EEOC Guidance states that depending on the facts and circumstances of the case, employers may be able to justify their screening policies solely under the three *Green* factors, i.e., the targeted screen.
 - (1) Determine what kind of criminal conduct demonstrates unfitness for performing the jobs at issue;
 - (2) Determine the duration of the exclusions based on all available evidence/information; and
 - (3) Identify essential job requirements and the actual circumstances under which the job will be performed.

WHAT IS AN "INDIVIDUALIZED ASSESSMENT"?

- **Definition:** A formal or informal method for covered entities to evaluate additional information about individuals who may be excluded from employment because of their criminal records.
 - Appeals Process
 - Waiver Procedure
 - Exemption
- **Three key elements:** notice; opportunity for applicants/employees to provide mitigating information; and employer consideration of mitigating information
- **Why do it?**
 - To consider evidence that the person's criminal record is *inaccurate*;
 - To consider whether the individual performed *similar work successfully*, post-conviction and without incident;
 - To consider other evidence of *rehabilitation*, e.g., additional training, education, etc.

BEST PRACTICES

- **Do:**
 - Hire/refer applicants based on their qualifications and their suitability for the job(s) in question
 - Develop a narrowly tailored policy and procedure for screening applicants/employees for past criminal conduct
 - Train decisionmakers about federal nondiscrimination laws as they pertain to the use of criminal records in referral/employment decisions
- **Don't:**
 - Automatically refuse to hire/refer applicants with criminal records
 - Treat applicants with criminal records differently based on their race, national origin, or another protected characteristic

ADDITIONAL INFORMATION

For additional information about the topics I addressed during the presentation, please reference the following EEOC websites:

- Enforcement Guidance:
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
- Qs & As:
http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm
- What You Should Know Fact Sheet:
http://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm

QUESTIONS?

Tanisha Wilburn
Senior Attorney Advisor
Office of Legal Counsel
tanisha.wilburn@eeoc.gov