

On Hiring / Criminal Records

MYTH: People with criminal records are automatically barred from employment.

FACT: An arrest or conviction record does NOT automatically bar individuals from all employment

The U.S. Equal Employment Opportunity Commission issued its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e.

These rules apply to all employers that have 15 or more employees, including private sector employers, the federal government, and federal contractors. Below are answers to common questions about the Guidance.

1) Does this Guidance prohibit employers from obtaining and using criminal background reports about job applicants or employees? No, the Guidance does not prohibit employers from obtaining or using arrest or conviction records to make employment decisions. The EEOC simply seeks to ensure that such information is not used in a discriminatory way.

2) How could an employer use criminal history information in a discriminatory way? First, Title VII prohibits disparate treatment discrimination. Employers should not treat job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic (disparate treatment discrimination). Second, Title VII prohibits disparate impact discrimination. Employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. In

legal terms, it is not "job related and consistent with business necessity."

3) How would an employer prove "job related and consistent with business necessity"? Is it burdensome? Proving that a criminal record exclusion is "job related and consistent with business necessity" is not burdensome. The employer can prove this if it (1) considers at least the nature of the crime, time since the criminal conduct occurred, and the nature of the job in question, and (2) gives an individual who may be excluded by the screen an opportunity to show why he or she should not be excluded.

4) Why should an arrest record be treated differently than a conviction record? An arrest record does not establish that a person engaged in criminal conduct. Arrest records may also be inaccurate (e.g., mistakenly identify the arrestee) or incomplete (e.g., do not state whether charges were filed or dismissed against the arrestee). Thus, an arrest record alone should not be used by an employer to take an adverse employment action. But, an arrest may trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action.

For More Information

EEOC Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII:
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

NELP's "Ban the Box" is a Fair Chance for Workers with Records
<https://s27147.pcdn.co/wp-content/uploads/Banthe-Box-Fair-Chance-Fact-Sheet.pdf>