



Criminal History Record Checks When Are These an Appropriate Basis for Hiring Decisions?

Many employers check the criminal history records of potential new employees and consider the results in making hiring decisions. However, as the Equal Employment Opportunity Commission recently explained in [updated guidance](#), employers must use criminal history records carefully in order to avoid potential liability under Title VII of the Civil Rights Act of 1964.

In particular, the EEOC warned that even a “neutral” policy of disqualifying job applicants based on criminal history can sometimes result in Title VII violations if it disproportionately impacts certain individuals. When an applicant’s criminal history is the basis for not hiring that person, the employer must be able to show that such history is relevant to the job in question and is a business necessity. If a person has been arrested but not convicted of any criminal charge, an employer must show that the conduct giving rise to the arrest makes the applicant unfit for the job.

To avoid liability, the EEOC recommends that employers take either of two actions in developing or refining a hiring policy: (i) the employer could validate its criminal conduct exclusions by using the EEOC’s [Uniform Guidelines on Employee Selection Procedures](#); or (ii) the employer could individually assess candidates. In the latter case, after carefully considering the nature of the crime as well as when it was committed and the nature of the job being sought, the employer would give the applicant an opportunity to provide additional information that might show that the policy should not be applied in his/her specific case because the disqualification would not be job-related or a business necessity.

Any other federal laws and regulations restricting people with criminal histories from certain jobs or industries must still be followed, and the EEOC’s guidance states that doing so would be a valid defense to a Title VII challenge. State laws and regulations imposing such restrictions are also valid except if they require or allow an “unlawful employment practice” under Title VII. In New York, the Correction Law [instructs](#) both public and private employers to conduct individualized assessments, except when another law requires that conviction for a certain offense automatically results in disqualification. Specific to the home care industry, New York law requires companies to check the criminal histories of potential health care aides as part of the hiring process. Therefore, adherence to this law would appear to be a defense against a Title VII challenge. In other industries (or in the home care industry as to non-direct care workers), the EEOC’s guidelines should be consulted in creating a protocol for consideration of criminal histories in hiring decisions.

DISCLAIMER: The information contained herein is provided by Glaser & Weiner, LLP for informational purposes only. These materials should not be considered as, or as a substitute for, legal advice and they are not intended to nor do they create an attorney-client relationship. Because the materials included here are general, they may not apply to your individual legal or factual circumstances. This document contains information that may be modified or rendered incorrect by future legislative or judicial developments. You should not take (or refrain from taking) any action based on the information you obtain from this document without first obtaining professional counsel. It is possible that under the laws, rules or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation. © 2012 Glaser & Weiner, LLP. All Rights Reserved.