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II Personnel Panel
Part 1: *Criminal Background Checks: A Useful Tool, Yet Risky*

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Criminal Background Checks: A Useful Tool, Yet Risky

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If your business is like most, you probably spend at least a small amount of time researching job candidates before you hire them. After all, your employees are the face of your business in the eyes of clients and the public; they are trusted to protect your business' goodwill; they know your trade secrets; and they can put your business in hot water when it comes to liability. Because employees have a great deal of power, more than 90 percent of employers nationwide conduct criminal background checks on job candidates.

The practice remains legal, but recent developments at the federal agency that enforces discrimination laws mean that businesses conducting these checks sh**o**uld tread more carefully than ever to ensure they don't inadvertently violate racial discrimination laws. In April, the Equal Employment Opportunity Commission (EEOC) issued new policy guidance on the subject of criminal background checks. The 54-page document reiterated some policies and clarified others, and it also left some employers wondering how—or whether—to use background checks.

I'm simply weeding out dangerous and dishonest people. How could that be discriminatory?

The use of criminal background checks can be discriminatory in two ways. The first possibility usually involves conscious, direct discrimination, where an employer holds an applicant of one race to a tougher standard with regard to unacceptable criminal history than another. This is called "disparate treatment discrimination." Employers who treat employees with the same record differently simply because they are of different races violate the racial discrimination component of Title VII of the Civil Rights Act of 1964. Most employers know this and don't do it.

The second scenario, however, is where it gets tricky, because businesses can get into trouble even when a hiring manager has no intention of discriminating. The EEOC calls this "disparate impact discrimination," which means a business automatically excludes all candidates with similar criminal records, but the exclusions disproportionately weed out a particular race and therefore become discriminatory. For example, African Americans and Hispanics are more likely than whites to be convicted of drug offenses even though they use drugs at a similar rate to whites. Additionally, African Americans and Hispanics are more likely than whites to be incarcerated in their lifetime; only 1 in 17 white men will go to prison at some point during his life, but the statistic rises to 1 in 6 for Hispanic men and 1 in 3 for black men. So, excluding people with convictions effectively excludes minorities at a higher rate than whites and could be found to discriminate against them based on the "disparate impact" theory.

The disparate impact theory was passed into law by Congress in the 1991 amendment to the Civil Rights Act. Even if you don't agree with the theory, you still have to comply with the law.

In particular, the EEOC is concerned that early criminal convictions of young men of color do not unnecessarily follow them throughout their lives.

Why did the EEOC release new guidance, and how is it different from the old?

The EEOC issued the new guidance for several reasons. First, after the EEOC issued its 1987 and 1990 policy statements on this issue, Congress passed the Civil Rights Act of 1991 codifying the disparate impact analysis and making the EEOC's previous statements somewhat out-of-date. Second, technology has changed substantially in the last 20 years, giving employers greater access to criminal backgrounds. Finally, in 2007, the Third Circuit Court of Appeals issued an opinion stating that the EEOC should provide in-depth analysis on the issue of criminal background checks.

The new guidance discusses the concept of "disparate treatment" in more detail than previous guidances, giving specific examples of when it applies, and it also explains the legal history behind "disparate impact." The guidance gives practical, "best practices" advice to employers on how to comply with the law when using criminal backgrounds. It also places more emphasis on the EEOC preference that employers who use criminal background checks consider actual convictions, not just arrests. Notably, the EEOC earlier this year went after Pepsi for having a blanket policy excluding applicants who had arrest and/or conviction records. In the subsequent settlement, Pepsi paid more than $3 million, to be divided among the 300 African American applicants allegedly discriminated against by the policy.

What are some of the best practices the EEOC recommends?

Employers should eliminate any policy that categorically excludes all applicants with a particular criminal record, train hiring officials on the discrimination prohibitions in Title VII, and develop a narrowly tailored written policy to be used when screening applicants and employees for criminal conduct. Any interview questions should be directly related to the job at issue, and any criminal history information collected on a candidate should be kept confidential.

Should I abandon my criminal background checks altogether, just to be safe?

Conducting criminal background checks are still legal, and we recommend them in most cases. Employers have an array of legitimate reasons for conducting background checks, including prevention of theft and fraud, prevention of workplace violence, public safety, and protection from claims of negligent hiring. Background checks can be an important hiring tool, but employers must not use them to exclude arbitrarily otherwise qualified applicants when the particular criminal background is not clearly relevant to the job duties.

It is crucial to avoid general exclusions based on entire categories of wrongdoing, but instead be able to make a specific link between the dangers of a specific criminal conduct and the risks inherent in a particular position. Employers need a procedure to assess each applicant individually to determine whether the reasons behind the broader policy apply to him or her specifically. For each candidate, an employer should consider three factors: 1) the nature and

seriousness of the conviction, 2) the nature of the job duties, and 3) the amount of time that has passed since the conviction.

In addition to creating procedures for individualized assessments, be sure to indicate on your applications and job postings that a criminal history will not necessarily exclude applicants for the job. Also, revise your general policies to remove absolute exclusions to hiring or retaining employees with prior convictions.

What if we have to exclude people to comply with other laws?

It is usually legal to exclude applicants for the purpose of complying with laws regulating that industry. People with certain criminal backgrounds are simply not allowed under federal or state law to perform particular jobs. An obvious example is a childcare center excluding people convicted of certain child-related offenses. Other laws require similar exclusions, and you probably know of some specific to your industry. Nursing, law enforcement, and banking are some industries with particular criminal background requirements. Be sure, however, that your requirements are not more stringent than the laws, unless you can meet the three factors of job relatedness for the additional requirements.

Are there any other circumstances where we can exclude people categorically?

Yes, but those circumstances are limited. Employers can exclude all applicants with certain criminal histories where the employer can point to data proving the exclusion is job-related and consistent with business necessity. Employers should be careful not to over-use this because it makes them more vulnerable to violations of Title VII. With time, and more litigation, more data will be available to prove that certain criminal histories are job-related.

What if I still don't know whether I am violating discrimination laws?

The evolving law of criminal background assessments can be nerve-wracking because most employers have no intention of discriminating, and they don't want to be accused of doing so inadvertently. Even employers who understand the rules may not understand the nuances, such as what questions to ask in an individualized assessment, whether the rules apply to firing existing employees, and whether an employer can ask questions about criminal history on hiring applications. This remains a convoluted area of the law, so consult an attorney before you develop or revise your policy on criminal background checks.