

Legal Defensibility of Criminal Background Checks

From the Experts

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In April 2012, the Equal Employment Opportunity Commission (EEOC) issued updated enforcement guidance on the use of criminal background checks in employment decisions. National crime statistics indicate that criminal background checks are more likely to disqualify blacks and Hispanics as compared to whites. Consequently, if criminal record exclusions are not closely tailored to job requirements, they are likely to be judged discriminatory and in violation of Title VII of the Civil Rights Act. The EEOC guidance reflects renewed focus in this area as evidenced by a recent string of discrimination lawsuits brought by the agency. Given the increased scrutiny, many employers are revisiting their criminal background check policies to ensure legal defensibility.

Legal Risk Still High Despite Recent Decisions

Two recent court decisions in this area have been unfavorable to the EEOC; in both cases the court criticized the EEOC and granted summary judgment to the defendant. However, employers should not become complacent, because both decisions centered on flaws in expert testimony that are less likely to jeopardize future cases.

The court dismissals were due to a failure to conclusively demonstrate evidence of discrimination. In *EEOC v. Freeman* (2013), summary judgment was granted to the employer due to concerns about the reliability of the expert testimony and the relevance of the statistical evidence. In *EEOC v. Kaplan* (2013), the EEOC's expert relied upon driver's license photos as a proxy for race, which was sharply criticized by the court. These cases emphasize the importance of reliable and relevant statistical evidence in discrimination claims. While the EEOC contends that national statistics are sufficient to support a finding of discrimination, these court decisions reflect a more conservative stance. The decisions indicate that evidence of discrimination may need to come from an employer's actual applicant pool.

While it may require more effort to pursue these claims than the EEOC anticipated, employers should nonetheless think twice before letting down their guard. Two major cases are pending (against BMW and Dollar General), and lawsuits in this area are likely to continue.

Constructing Criminal Background Exclusion Criteria Is a Challenge

While the end result of a criminal background check is a simple pass/fail decision, constructing appropriate screening criteria can be challenging. Most employers use a set of rules that specify which crimes will exclude applicants from being hired for a position and how far back in time the exclusion should apply (i.e., how many years after conviction or release from prison). Unfortunately, many employers do not follow a structured, rigorous process for developing exclusion criteria, which can result in questionable screening practices.

A 2011 report by the National Employment Law Project revealed that some of the nation's largest employers are using overly broad exclusion criteria that practically invite complaints of discrimination (e.g., refusing to consider applicants with any convictions). The prevalence of overly broad criteria is understandable since employers have powerful incentives for excluding criminal offenders. Companies' desire to avoid negligent hiring claims, safeguard customers and employees, and reduce employee theft may inadvertently result in criteria that are too broad for the position in question.

Disqualifying crimes should have a clear relationship to major job duties. For example, a DUI conviction is clearly related to driving a school bus, and a burglary conviction has obvious implications for employees who pick up goods from residences (see *West v. Salvation Army*, 2007).

Employers face more difficult decisions and greater risk of having their policies challenged when disqualifying crimes are less obviously related to job duties. For instance, in a 1998 case a large retailer argued that marijuana possession precluded someone from stocking shelves, but a court disagreed.

A particularly challenging task for employers is specifying the exclusionary time period for each disqualifying crime. Many organizations rely on time periods that are unrelated to actual reoffending risk, but are based on highly subjective judgments about what time period "feels right." For example, employers often adopt a standard of seven years, merely out of convenience or familiarity (a seven-year period is regularly used on credit reports).

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Consider the hypothetical scenario presented in the exercise below. Can you determine the appropriate criteria?

An Exercise in Developing Criminal Background Exclusion Criteria

Hotel front-desk clerks must maintain the confidentiality of information, protect the privacy and security of guests and coworkers, and protect equipment and other company assets.

Q1: Which of the crimes below are related to the major job duties?

Q2: For those crimes that are job-related, for how long after conviction or release should applicants be excluded?

- Assault: __ years
- Petty Theft: __ years
- DUI: __ years
- Prostitution: __ years
- Possession of Marijuana: __ years
- Narcotics Sale/Distribution: __ years

Typically, organizations have attempted to defend their exclusion criteria on the basis of the *Green* factors (*Green v. Missouri Pacific Railroad*, 1975). Under *Green*, targeted screens must be developed considering the nature and gravity of the crime; time elapsed since the offense, conviction, or completion of the sentence; and nature of the job.

Even if an employer relies on the *Green* factors to develop its exclusion criteria, the EEOC or courts may reject the criteria for various reasons. This is because there is no widely established standard process for determining the relevant crimes and appropriate exclusionary periods, leaving employers to their own devices. For instance, in *El v. SEPTA* (2007), the employer was able to defend the criminal background exclusion in question (i.e., murder conviction), but its overall policy did not withstand the court's scrutiny. The employer "could provide little insight into how the policy was written, on what research or information it was based, or why it was structured as it was."

A Rigorous Process

Employers should use a structured, rigorous, and well-documented process for constructing criminal background check policies. That is, they should be professionally *validated* to establish the job-relatedness of disqualifying crimes and exclusionary time periods. This is particularly important for high-volume jobs or jobs where there is considerable risk to security or safety. Such a process should:

- Ensure individuals who are providing input into the development of exclusion criteria are appropriately qualified.
- Identify the risks posed by prior convictions for specific crimes.
- Consider the opportunities provided by the job to engage in criminal behavior.
- Rely on empirical data on the risk of reoffending.
- Document evidence for each job or group of similar jobs.
- Adhere to the principles in the *Uniform Guidelines on Employee Selection Procedures*, which establish standards for legally defensible employment practices and are often relied upon by courts.

A rigorous process ensures that the bar to employment is set at the appropriate level. Just as one would not administer an accounting test to an applicant for a cashier job, criminal background exclusions should not be so restrictive that they go beyond job requirements. A criminal background check policy can be overly restrictive by including disqualifying crimes that are not job-relevant and/or setting exclusionary time periods that are too long, either of which will likely exacerbate adverse impact against African Americans and Hispanics.

In the End

The legal landscape for conducting criminal background checks is dynamic and complex, requiring employers to achieve a delicate balance between negligent hiring risk and potentially discriminatory employment practices. However, by limiting exclusions to those that are demonstrably job related, employers can protect their legitimate business interests and avoid costly litigation.

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