

My Job Applicant Has a Criminal Conviction: What Do You Mean I Can't Deny Employment?

Updated Guidance from the EEOC on **Criminal Background Checks**

On April 25, 2012, The U.S. Equal Employment Opportunity Commission (EEOC) issued updated Enforcement Guidelines regarding an employer's use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended (Title VII).



For most organizations, it is a common business practice to seek information during the application process about criminal convictions, particularly those which are job related, such as a history of theft for someone who may have access to company property or customer information, or assault for someone whose job may include going into customer's homes, etc.

Unless otherwise guided by state law such as in California, Massachusetts, and Connecticut, an employer is not prohibited under Title VII from requiring applicants or employees to provide information about convictions, although it is unlawful to discriminate in employment based on race, color, national origin, religion, or sex.

Having said, the EEOC Enforcement Guidance issued on April 25, 2012 does not suggest an employer must give hiring consideration to an applicant with a criminal conviction, but rather, not automatically bar the applicant from employment giving the applicant a chance to explain and the employer an opportunity to determine among other factors, if the conviction is job related; e.g.: Applicant with a recent theft conviction working in a position with access to company funds or customer's confidential information.

When considering the arrest or conviction history of a current or prospective employee. Among other topics, the **EEO guidance discusses:**

- How an employer's use of an individual's criminal history in making employment decisions could violate federal and state laws and be considered employment discrimination under Title VII;
- Federal court decisions analyzing Title VII as applied to criminal record exclusions;
- The differences between the treatment of arrest records and conviction records;
- The applicability of disparate treatment and disparate impact analysis under Title VII;
- Compliance with other federal laws and/or regulations that restrict and/or prohibit the employment of individuals with certain criminal records; and
- Best practices for employers.

Bottom line: What do I need to do as a Business Owner or Manager/HR Professional?

1. Review and update your policy regarding background checks and criminal convictions.
2. Be sure you don't have a policy which automatically bars anyone from employment with a conviction and expressly state on the Application for Employment a conviction is not an automatic bar to employment.
3. Ensure updated written job descriptions which help identify if a conviction is job related.
4. Create a process to allow applicants to submit individual information and consider:
 - ✓ The facts or circumstances surrounding the offense or conduct;
 - ✓ The number of offenses for which the individual was convicted;
 - ✓ How long ago did the conviction(s) occur;

- ✓ Evidence the applicant has performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
 - ✓ The length and consistency of employment history before and after the offense or conduct;
 - ✓ Rehabilitation efforts, e.g., education/training;
 - ✓ Employment or character references and any other information regarding fitness for the particular position;
 - ✓ **Regulatory Licensing guidelines**
5. Perform a legal analysis considering all the facts and grant waivers where warranted (Be careful to avoid disparate treatment, as well as negligent hiring).
 6. Train hiring managers and decision makers.

Additional Resources:

- [Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII](#)
- [Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII](#)

For more information on compliance with Employment Labor Laws and all your HR needs, contact Mike Dobert, S.P.H.R. at HR in Alignment, LLC. @ 281.494.2985 or mdobert@hrinalignment.com You may also visit us at www.hrinalignment.com.

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