I. Overview

It has become common practice in recent years for employers to conduct criminal background checks on job applicants, with many employers refusing to consider for employment any person who has been convicted of a felony. Some employers will reject applicants even on the basis of an arrest only.

Both the federal and D.C. governments have expressed concern that such policies effectively discriminate against persons of color, who are more likely to be arrested and convicted for felonies than white applicants who engage in the same behavior. An applicant may have an arrest and conviction on his record that occurred decades earlier and which has little bearing on the applicant’s ability to perform a job.

In response, the D.C. City Council has adopted so-called “Ban the Box” legislation, which limits the ability of employers to use criminal background checks to screen applicants, while the Equal Employment Opportunity Commission (EEOC) has issued guidelines intended to help an employer make use of criminal records without inadvertently engaging in illegal discrimination.

II. D.C.’s Ban the Box Law

Under D.C.’s Fair Criminal Record Screening Amendment Act of 2014, an employer that employs more than 10 people in the District of Columbia is generally barred from asking job applicants about their criminal histories in an initial job application.

Employers may inquire about whether an applicant has been convicted of a crime only after the employer has made a conditional offer of employment to the applicant. If the applicant has a criminal history, the employer may only withdraw the job offer if it has a “legitimate business reason” for doing so.

D.C. law provides that certain employers are exempt from the prohibition on initial criminal screenings, including employers that provide services to minors or vulnerable adults.

The D.C. Bar Pro Bono Center’s legal alert on the D.C. Fair Criminal Record Screening Amendment Act of 2014 contains more information on exempt employers and the definition of “legitimate business reason.” Montgomery County, Prince George’s County, and Baltimore City in Maryland have similar laws, but there is no statewide law in Maryland and Virginia.
III. EEOC Guidelines

Employers who use criminal records in their hiring decisions must comply with federal rules governing an employer’s use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended.

The EEOC has issued guidance on those rules, reminding employers that the use of criminal background information in making employment decisions may subject employers to Title VII liability.

While this guidance is especially relevant in jurisdictions that do not have “Ban the Box” laws, employers in jurisdictions that prohibit initial screening of applicants based on their criminal histories should nevertheless be aware that their use of criminal histories in later stages of the application process are equally subject to EEOC scrutiny.

The EEOC is responsible for the enforcement of Title VII, a federal law prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin. Although Title VII does not specifically regulate an employer’s use of criminal records, the EEOC has long viewed an automatic exclusion of all individuals with a criminal record as a form of unlawful racial or national origin discrimination.

Under Title VII, an employer may be liable for discrimination if the employer:

- Engages in intentional discrimination; or
- Adopts a neutral policy or practice that excludes persons of a particular race or national origin in greater numbers than

the general population (known as disparate impact discrimination).

Criminal background checks, when improperly used, may cause an employer to be liable for disparate impact discrimination. However, employers can avoid discrimination claims by following the EEOC’s suggested best practices.

A. Liability under Title VII

An employer may be subject to liability under Title VII if it uses a prospective employee’s criminal record to engage in intentional discrimination. Thus, an employer can be found liable for intentional discrimination if it denies an African American applicant employment based on his or her criminal record, yet hires a similar Caucasian applicant with a comparable criminal record. For example:

- John, who is Caucasian, and Robert, who is African American, are both high school graduates of the same high school. They have similar skill sets and work experience. They both pled guilty to misdemeanor charges of theft in high school, which is the only offense on their criminal records. While in their 30s, they both apply for a cashier position at a District of Columbia supermarket. After the initial interview, both applicants are offered the position, conditional on a criminal background check. The employer obtains John’s and Robert’s permission to conduct a background check, which reveals their theft convictions. The employer withdraws Robert’s offer, stating that he cannot afford to have a convicted thief in charge of the cash register. The same employer hires John on the grounds that his youth at the time of the
conviction and his subsequent clear criminal record makes the conviction unimportant.

In the above example, the EEOC concludes that the supermarket has treated John and Robert differently based on race and has intentionally violated Title VII.

An employer may also be found liable if it engages in disparate impact discrimination. This occurs when the employer engages in a practice that does not appear discriminatory on its face, but has a more negative impact on one group of individuals than another.

For example, an employer who withdraws job offers from all applicants who have been arrested for drug offenses in the last 10 years may believe this policy is not discriminatory because it treats applicants of all races and national origins the same. However, under the EEOC Guidance, the employer may actually be liable for discrimination if the evidence shows that the policy excludes certain minority groups in greater numbers than the general population.

B. Defense of Disparate Impact Liability

The EEOC Guidance devotes extensive discussion to how an employer can justify a hiring policy that excludes job applicants with criminal records. To defend the use of such a policy, an employer must show that the policy is related to the job in question and consistent with business necessity.

First, the EEOC distinguishes between arrest records and criminal conviction records. The EEOC takes the position that employers should not rely only on arrest records when making employment decisions because “arrests are not proof of criminal conduct.”

Subject to certain exceptions, it is also prohibited under D.C. law, unless the charges are currently pending.

By contrast, a criminal conviction makes it more likely that the individual did in fact engage in the criminal conduct at issue. For employers that are legally permitted to ask for information about an applicant’s criminal history on the initial application, the EEOC still recommends that employers not ask about all convictions on job applications. If an employer decides to ask about criminal records, the EEOC recommends that the employer limit its questions to the type of criminal conduct for which the exclusion would be job-related for the position in question and consistent with business necessity.

Next, to show that a policy or practice is job-related for the position in question and consistent with business necessity, the EEOC believes employers will “consistently meet” this standard if the employer takes into consideration:

- The nature and gravity of the offense or conduct;

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1 EEOC Guidance at 12.

2 Under D.C. law, an employer that employs more than 10 employees in the District can use arrest records to screen out a job applicant only under specific and, limited circumstances. Similar rules apply in Prince George’s and Montgomery counties and Baltimore City, Maryland.

3 The EEOC states that “the nature of the offense or conduct may be assessed with reference to the harm caused by the crime (e.g., theft causes property loss). The legal elements of a crime also may be instructive...With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies.” EEOC Guidance at 15.
• The time that has passed since the offense or conduct and/or completion of the sentence;
• The nature of the job held or sought; and
• An individualized assessment of people excluded by the screen to see if the policy as applied to the individual is job related and consistent with business necessity.4

The EEOC suggests that, in addition to following these four steps, an employer conduct an individualized assessment that would:

• Provide notice to the individual that he or she has been screened out because of a criminal conviction;

• Provide an opportunity for the individual to show that the exclusion should not be applied because of his or her particular circumstances; and

• Take into consideration whether the additional information provided by the individual calls for an exception to the exclusion and shows that the policy applied in these circumstances is not job related and consistent with business necessity.

If the individual does not respond to the employer’s request for additional information, the EEOC states that the employer may make its employment decision without the information. The EEOC also states that an individualized assessment is not always required, but is recommended to avoid liability for discrimination.

The following example illustrates a criminal exclusion that is not job-related and consistent with business necessity:

• A nonprofit that runs after-school enrichment programs for low-income children uses online applications for all positions at the organization. Before any applicant may submit an online application, an applicant must answer certain questions, including “Have you ever been convicted of a crime?” If the answer is yes, the online system automatically ends the application process, and the applicant views a screen that states “Thank you for your interest. We cannot continue to process your application at this time.” The employer does not have any record of the reasons it adopted the policy exclusion, and it does not have data to show that convictions for all offenses make all applicants an unreasonable risk in all jobs.

Based on the above example, the EEOC concludes that if the applicant files a complaint with the EEOC and shows that the policy excluded more members of one race or nationality than the others, the EEOC would find reasonable cause to believe that the blanket exclusion was not job-related and consistent with business necessity. In other words, the policy fails to satisfy the job-related and business necessity test because all convictions are not relevant to all of the employer’s jobs, and the policy

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4 An employer may also meet the requirements of the law if it can show that there is a statistical correlation between the criminal conduct and subsequent work performance.
fails to consider the applicant’s individual circumstances. 5

Keep in mind that excluding anyone with a criminal conviction without individually assessing the applicant’s individual situation will probably raise concerns with the EEOC. Thus, the EEOC gives the following example to show how an employer should individually review an applicant with a criminal conviction.

• An employer rents meeting rooms and other facilities to various organizations. The employer has a rule prohibiting anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position that requires an individual to handle personal financial information for at least four years after the conviction or release from jail. This rule was chosen by the employer based on data from the local corrections department, national criminal data, and recent recidivism research on theft crimes. The employer also offers an opportunity for individuals who are screened out by the policy to provide information to show that the exclusion should not apply to that individual.

The EEOC concludes that the above policy is job-related and consistent with business necessity because it is “carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and that policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct.” 6

The EEOC also cautions employers to avoid the rationale that “we only hire the best of the best” to support a particular policy or practice. The EEOC believes that a defense of this nature does not meet the business necessity standard because it lacks factual support for the belief that having a conviction equates to poor job performance, and it fails to show that all convictions create a risk in all of the employer’s jobs at any time.

In general, the EEOC disapproves of blanket criminal conduct exclusions because they discriminate on the basis of race and national origin.

Even if an employer can show that its policy or practice is job-related for the position in question and consistent with business necessity, a plaintiff’s claim of discrimination may still prevail if he or she can show that there is a less discriminatory alternative employment practice - such as reconfiguring a job so that the criminal conviction is no longer relevant - that serves the employer’s legitimate business needs, and the employer did not adopt that practice.

C. Exceptions to Title VII Liability

The EEOC recognizes that there are times when an employer must reject an applicant with a criminal background, regardless of the circumstances surrounding the conviction. Therefore, it provides for the

6 Additional examples that may be helpful to employers can be found on pages 18 and 19 of the Guidance.
following exceptions, which clearly allow an employer to refuse employment to an applicant with a record of criminal conduct when:

- Federal law or regulations establish specific criminal conduct exclusions for certain jobs. (However, if the employer’s policy exceeds the scope of the federal law, the employer can be found liable for going beyond the scope of the federal requirement); and

- The position in question is subject to national security requirements that are imposed by federal law and the adverse employment action resulted because of a denial or revocation of a security clearance.

On the other hand, compliance with state or local laws that require criminal conduct exclusions will not serve as a defense unless the employer can demonstrate that the exclusion was job-related and consistent with business necessity.

For example, suppose state law provides that a job applicant with a criminal conviction for a sex crime cannot work in a day care center, and the center would lose its license if it hired the applicant. In that case, the employer should be able to show that it did not violate Title VII by refusing to hire the applicant because the criminal behavior was job-related and the exclusion was a business necessity.

**D. Best Practices**

Finally, the EEOC Guidance encourages employers to adopt the following best practices when considering criminal background information in employment decisions:

1. Eliminate blanket criminal conduct exclusion policies.
2. Develop narrowly tailored written policies and practices to screen applicants and employees for criminal conduct.
3. Train staff on Title VII’s prohibition against employment discrimination and how to implement new policies and procedures in compliance with Title VII.
4. Identify the essential job requirements and the circumstances under which all jobs are performed.
5. Identify specific criminal conduct that may show an applicant is unfit for the position.
6. Identify the appropriate period of time that must pass until a criminal record is no longer relevant in hiring someone for the position in question (using the “individualized assessment” discussed above).
7. Record the justification for the policies and procedures and keep a record of all consultations and research considered in creating policies and procedures consistent with Title VII.

**IV. Conclusion**

In addition to complying with any relevant “Ban the Box” legislation in their nonprofit’s jurisdiction, employers should review their job applications and criminal conduct exclusion policies, as well as their staff training related to these matters, to ensure that their practices reflect those recommended in the EEOC Guideline.
VII. Additional Resources

Equal Employment Opportunity Commission: Guidance
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Montgomery County Office of Human Rights: Ban the Box Ordinance
http://www.montgomerycountymd.gov/humanrights/Ban_the_Box.html

Prince George’s County Council: Fair Criminal Record Screening Standards

Baltimore City Office of Civil Rights and Wage Enforcement: Fair Criminal Record Screening Practices
http://civilrights.baltimorecity.gov/ban-the-box

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