



Help Desk FAQ:

The EEOC's Guidelines on Criminal Backgrounds



What HR Professionals Need to Know **about the EEOC's Guidelines on Criminal Backgrounds**

According to a survey released by the Society for Human Resource Management, approximately 69% of organizations reported that they conduct criminal background checks on all of their job applicants. However, what happens if something questionable shows up on the background check that reveals a criminal past? Do you have the right to ask them about it?

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Do You Have the Rights to Ask About It?

Yes, you do. The Equal Employment Opportunity Commission (EEOC) guidelines strongly recommend employers speak to their candidates about a criminal history brought up in a background check.

In a Guidance document released in 2012, the EEOC describes the circumstances under which an employer's use of arrest and conviction records can violate Title VII's disparate treatment and disparate impact theories. The EEOC continues to embrace a test that evaluates criminal history, known as the Green factors.

The Green factors include:

1. The nature or gravity of the offense or conduct
2. The time elapsed since the conviction and/or completion of the sentence
3. The nature of the job sought or held

Application Questions:

As a best practice, the EEOC encourages employers to not ask about convictions on an employment application. However, if the employer does ask the applicant about their criminal background past, the Guidance recommends that they only ask questions that are relevant to the position and job duties.

Arrest Records:

The Guidance states that an employer may not use arrest records to solely treat an applicant differently and cannot use arrest records alone as a reason to deny employment. However, if an employee has been arrested, the Guidance allows employment decisions to be based on the conduct underlying the arrest. As long as the reason for which the employee or applicant was arrested is relevant and makes the individual unfit for the position, than the employee or applicant may be terminated/not offered employment for the arrest.

Individualized Assessments:

This is when an employer will inform an employee or applicant that he or she will be screened for a criminal background. The individual is given an opportunity to respond and then the employer considers the circumstances before making a decision.

“In the Guidance, the EEOC states that employers who develop a targeted screen using the Green factors as well as the individualized assessment, can avoid Title VII liability.”

Compliance with Federal Law:

“The Guidance affirms that an employer who is conducting criminal background checks in order to comply with another federal law or regulation will not violate Title VII.”

However, the EEOC states that if a screening exceeds the scope of a federally imposed restriction, liability can occur if an employer doesn't provide evidence that justifies an enhanced policy.

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EEOC Guidance Check List for HR Professionals

- Review background screening policies and practices
- Make adjustments needed to the extent practices cannot be justified as job-related and consistent with business necessity
- If your policy doesn't currently give applicants and employees the opportunity for individualized assessments, then consider the possibility of implementing a procedure in your workplace.
- Train recruiters and job interviews to use criminal history lawfully in accordance with the Guidance
- Review the list of employer best practices in the Guidance

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