

Gavel to Gavel: New EEOC guideline

THE JOURNAL RECORD

On April 25, the Equal Employment Opportunity Commission issued an enforcement guidance on "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964."

This guidance outlines the EEOC's positions, some of which go beyond what's required by law, on employer use of arrest and conviction records in the job-screening process. It also offers best practices to avoid policies that can result in discrimination. The EEOC started with existing case law, which focused on nature and gravity of the offense; time passed since the offense, conviction or completion of sentence; and nature of the position held or sought. Even if a hiring policy aptly considers these factors, the EEOC took it further, suggesting that employers conduct an individualized assessment before excluding an applicant based on criminal history. The assessment is an opportunity for the applicant to refute the accuracy of records or demonstrate that the offense, when considered individually, is not relevant to the essential job duties. Here's some basic advice to employers on handling criminal records.

- Treat similarly situated individuals the same, regardless of race. If Caucasian and Hispanic applicants with comparable qualifications and similar criminal records apply for the same opening, to hire one and not the other is discrimination.
- Being arrested is not the same as being convicted. Excluding individuals based on arrest records, especially if unrelated to performance of job duties,

could leave your company exposed.

- Narrowly tailor your hiring policies. Identify job requirements and specific offenses that may demonstrate unfitness for the job; determine the length of exclusion; and provide an individualized assessment for applicants prescreened by the policy. Document your justification for the policy and any research or expert consultation utilized in the process.
- Make the individualized assessments meaningful. Criminal background reports can contain inaccuracies, so it's reasonable to give the applicant an opportunity to present information on the facts and circumstances of the offense, number of the offenses, age at the time of conviction and any records related to employment, rehabilitation, education, training or being bonded.

Employers reluctant to abandon the use of criminal records in the job-screening process may want to seek legal counsel to develop a tailored screening policy. *Byrona Maule is a labor and employment attorney and director of Oklahoma City-based Phillips Murrah law firm. Email bjmaule@phillipsmurrah.com*