

BACKGROUND BUREAU, INC. EXPLAINS THE E-RACE



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E-RACE, the Recent EEOC Initiative Prompts Review of the Agency's Guidance on Use of Criminal Records By Russ Dempsey

The Equal Employment Opportunity Commission (EEOC) has created a new initiative, E-RACE (Eradicating Racism And Colorism from Employment), based in part upon background check practices. The EEOC notes as a reason for the E-RACE initiative on its website that:

Some facially neutral employment criteria are significantly disadvantaging applicants and employees on the basis of race and color. Studies reveal that some employers make selection decisions based on names, arrest and conviction records, employment and personality tests, and credit scores, all of which may disparately impact people of color.

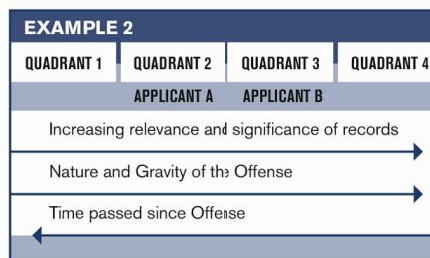
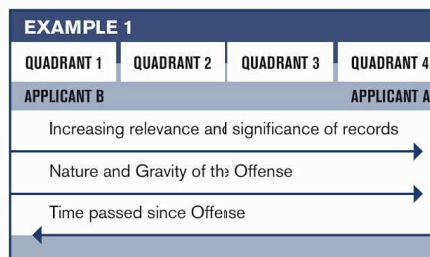
Based on the EEOC's new initiative and potential focus, employers should review the EEOC's position on the use of conviction and arrest records. Use of conviction and arrest records in pre-employment screening is a prudent practice that may help protect your company from negligent hiring claims, and consideration should be given to use of records in compliance with the law. In particular, employers should not have blanket policies against hiring applicants with any criminal record or a certain credit score.

Human Resources and hiring managers should be familiar with the EEOC's requirements, as well as, any relevant state law.

Moreover, documentation may prove to be invaluable if an applicant, employee, or the EEOC challenges an employment action. To that end, we suggest documenting the use of conviction and arrest records. Employers should establish a process by which the employer can memorialize that it considered the nature and gravity of the offense, time that has passed since offense, and the nature of the job held or sought.

For convictions records, you may consider a process to chart the nature and gravity of the offense taking into account the time that has elapsed, such as in the following examples. In

Example 1, Applicant A has a felony conviction for passing bad checks and the record is within the last 3 years. Applicant B has a misdemeanor conviction for speeding and the record is within the last 2 two years. To properly consider the record, you have to also note the job sought or held. Applicant A and B are both applying for a position as a Controller, which provides access to financial information and funds. Applicant A has a serious conviction that is directly related to the job and Applicant B's conviction is unrelated to the job.



This analysis can be highly sensitive to the facts. Assume the same facts as in Example 1, except that the Applicants are applying for a position as a delivery driver. The nature of the job and how the records relate to the position changes the relevancy. You should keep in mind that if the records were more recent in time or older that those facts would also impact the analysis. In Example 2, the speeding conviction is considerably more

relevant, while the passing bad checks record is less relevant.

One additional step is necessary for an arrest record, as Employers must consider whether the applicant is likely to have committed the alleged conduct. When considering an arrest record, employers should examine the circumstances, offer the applicant an opportunity to explain, and make follow-up inquiries as necessary.

In conclusion, you should take time to review your company's procedures for the use of conviction and arrest records, as the EEOC's new initiative shows that this may be an area of increased enforcement activity. Documenting use of criminal records can be challenging as the analysis is fact sensitive, but may prove to be a valuable process as it may help you demonstrate compliance. ■

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