

## **EEOC Guidance and Background Investigations: 8 Important Factors to Consider When Reviewing an Applicant's Prior Convictions**

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Minorities with arrest and conviction records whose civil rights are violated can sue under Title VII. It is important for employers and human resource professionals to follow best practices and comply with EEOC Guidelines. To be in compliance with the Equal Employment Opportunity Commission (EEOC), an employer must consider these eight factors when considering an applicant's prior conviction(s):

### **1.) The state's public policy to encourage the hiring of those who have been convicted of crimes**

According to the Legal Action Center (LAC) website, a non-profit law and policy organization dedicated to fighting discrimination against people with criminal records, among other things:

- 14 states have legal standards governing public employers' consideration of an applicant's criminal record that require an individualized assessment of the applicant qualifications and ability to do the job.
  - These include: Arizona, Colorado, Connecticut, Florida, Hawaii, Kansas, Kentucky, Louisiana, Minnesota, New Mexico, New York, Pennsylvania, Washington and Wisconsin.
  - 5 of these states regulate private employers: Hawaii, Kansas, New York, Pennsylvania and Wisconsin
  - To see an overview of the laws of all fourteen states on the LAC website, click here. ([http://www.lac.org/toolkits/standards/Fourteen\\_State\\_Laws.pdf](http://www.lac.org/toolkits/standards/Fourteen_State_Laws.pdf))
- According to NOLO.com, a website providing free legal information:
  - Some states prohibit employers from asking about arrest records, at least if the arrest is no longer pending
  - Some states allow employers to ask about convictions under certain circumstances
  - To view state law information regarding employer use of arrest and conviction records, select the state from this NOLO website page: [www.nolo.com/legal-encyclopedia/state-laws-use-arrests-convictions-employment.html](http://www.nolo.com/legal-encyclopedia/state-laws-use-arrests-convictions-employment.html)

### **2.) The duties and responsibilities that are necessarily related to the job**

### **3.) Whether the conviction has a bearing on the applicant's ability to perform those duties and responsibilities**

### **4.) The seriousness of the offense**

### **5.) How much time as passed since the conviction(s)**

### **6.) Any information the application provides about his or her rehabilitation**

To consider numbers 2 through 6, it is helpful to look at the landmark 1975 case of *Green v. Missouri Pacific Railroad* (MoPac). According to an article on the Society for Human Resource Management website, (SHRM.org), the EEOC guidelines don't prohibit criminal background checks but an employer must show "that the policy operates to effectively link specific criminal conducts, and its dangers, with the risks inherent in the duties of a particular position." EEOC's 52-page Guidance document that was released in 2012, "embraced the use of the long-standing three factors that were identified by the court in *Green v. Missouri Pacific Railroad*":

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

Here are the highlights of this milestone case:

**Buck Green v. Missouri Pacific Railroad Company (MoPac), the United States Court of Appeals, Eighth Circuit – 1975:**

- MoPac followed an absolute policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense. Green, who is an African-American, raised the question of whether this policy violated Title VII of the Civil Rights Act of 1964
- In 1970, Green applied for employment as a clerk at MoPac's personnel office and disclosed that he had been convicted in 1967 of refusing military induction. His refusal led to him serving 21 months in prison after he was denied conscientious objector status.
- After reviewing the application form, MoPac's personnel office informed Green that he was not qualified for employment because of his conviction and prison record.
- The court noted that Green had paid his debt to society for a nonviolent crime and that it was difficult to view this conviction as related to any job qualification. In addition, Green worked as a clerk during his 21 months of imprisonment and received "superior" ratings from his new employer at the job he held during the time of his trial in this case.
- The court gave an example that in certain circumstances, it would logically prohibit and refuse employment where the felony conviction would directly reflect on the felon's qualifications of the job as in a conviction of embezzlement and a job requiring the handling of large sums of money.
- The court analyzed a provision of the Iowa Code whose language was instructive even though it didn't arise under Title VII.
- The Iowa code had an across-the-board prohibition against the employment of felons in certain civil service positions. The court for the Green case criticized the Code, stating, "There is simply no tailoring in an effort to limit these statutes to conform to what might be legitimate state interests."
- The court decided that the Iowa provision suffered from a total lack of such narrowing criteria. "As a result, the statute is both over and under inclusive: Persons who clearly could serve the public interest are denied civil service jobs, while misdemeanants convicted of crimes indicating lack of probity suffer no disqualification."
- **Key Wording of the Case: "In short, no consideration is given to the nature and seriousness of the crime in relation to the job sought. The time elapsing since the conviction, the degree of the felon's rehabilitation, and the circumstances under which the crime was committed are simply ignored."**

**7.) How old the applicant was at the time of the offense**

An online company that assists business owners create job applications warns customers to make sure the information they request doesn't violate anti-discrimination laws with regard to age and other factors. According to [www.bizfilings.com](http://www.bizfilings.com), this disclaimer can be handled in this way:

- *"Conviction of a crime will not necessarily be a bar to employment. Factors such as age at the time of the offense, type of offense, remoteness of the offense in time, and rehabilitation will be taken into account in determining effect on suitability for employment."*

**8.) The employer's legitimate interest in protecting property and the safety and welfare of individuals and the public**

This topic was eloquently addressed in the written testimony of Barry A. Harstein, Shareholder/Littler Medderson, P.C. in July of 2011 and is published on the EEOC website.

(<http://www.eeoc.gov/eeoc/meetings/7-26-11/hartstein.cfm>)

***Here are some excerpts from Harstein's written testimony:***

**Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier**

“There are many interests that need to be weighed in the balance in dealing with criminal history records, including criminal background checks in employment. There clearly is a public interest and important public policy of integrating ex-offenders into the workforce. From every study I have read, and perhaps even common sense, steady and gainful employment can help reduce recidivism. Having accurate information about an individual's criminal history also is important because of its potential adverse consequences for both the individuals and prospective employers. Also weighing in the balance is the need to evaluate the risk of hiring someone with certain types of criminal records which may pose a legitimate concern in the interests of protecting employees, customers, vulnerable persons and a company's business assets...”

“The upshot is that employers have implemented criminal background checks for a wide variety of reasons and/or for particular types of positions, including concerns of public safety involving employees, safeguarding property and/or positions of trust, and certain industries in which such background checks are mandated. From my experience, criminal background checks never have been designed as an exclusionary tool to circumvent our laws prohibiting discrimination in the workplace.”

Harstein urged EEOC to take into account President Obama's guidelines to “balance the need to protect the public welfare with an employer's legitimate business needs.”

***Obama/January 18, 2011:*** “Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative”.

Harstein concluded by urging the Commission to recognize employer efforts in “formulating workplace policies to ensure consistent treatment among employees, which are tied to an employer's legitimate business needs” and “work in partnership with the employer community by supporting good faith efforts in dealing with this challenging issue.”

In summary, it is imperative to train HR Managers and employees on EEOC laws or employers could face a law suit and/or fine worth hundreds of thousands of dollars. It is best to use common sense and treat each employment application on a case by case basis. Avoid subjective employment decisions based on personal stereo types or hidden biases and eliminate any blanket policy against hiring a certain group of individuals. Consider convictions carefully before making an adverse hiring decision. As long as employers stick to these guidelines, their hiring policies should pass any scrutiny by an EEOC investigation.