

## Background Bureau, Inc. Client News

### *Recent EEOC Initiative Prompts Review of the Agency's Guidance on Use of Criminal Records*

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:

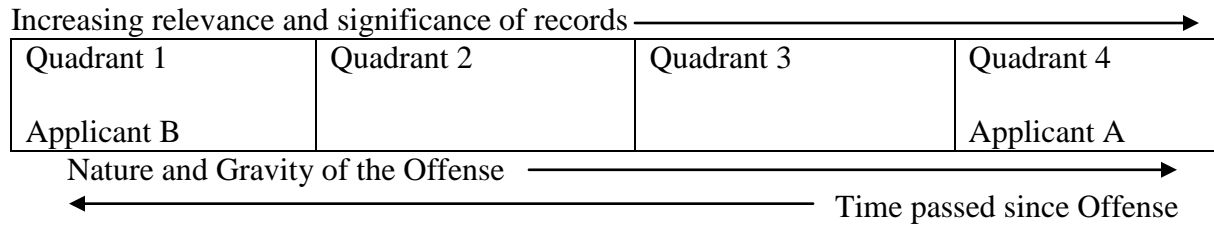
Some facially neutral employment criteria are significantly disadvantaging applicants and employees on the basis of race and color. Studies reveal that some employers make selection decisions based on names, arrest and conviction records, employment and personality tests, and credit scores, all of which 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. The relevant section of the EEOC Compliance Manual on use of conviction and arrest records is provided below on page 3 for your review. 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.

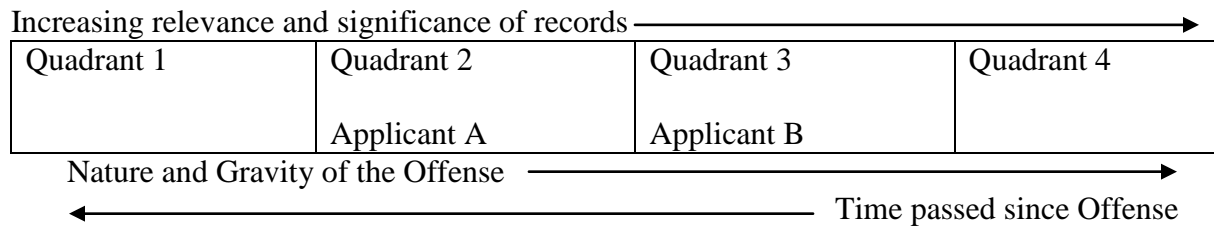
For convictions records, you may consider a process to chart the nature and gravity of the offense taking into account the time that has elapsed, such as in the following examples. In Example 1, Applicant A has a felony conviction for passing bad checks and the record is within the last 3 years. Applicant 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. The records may be charted as follows:

### Example 1



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. An employer may chart the offenses in this scenario as:

### Example 2



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.

## ***EEOC Compliance Manual***

### ***Conviction and Arrest Records***

*Of course, it is unlawful to disqualify a person of one race for having a conviction or arrest record while not disqualifying a person of another race with a similar record. For example, an employer cannot reject Black applicants who have conviction records when it does not reject similarly situated White applicants.*

*In addition to avoiding disparate treatment in rejecting persons based on conviction or arrest records, upon a showing of disparate impact, employers also must be able to justify such criteria as job related and consistent with business necessity. This means that, with respect to conviction records, the employer must show that it considered the following three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought. A blanket exclusion of persons convicted of any crime thus would not be job-related and consistent with business necessity. Instead, the above factors must be applied to each circumstance. Generally, employers will be able to justify their decision when the conduct that was the basis of the conviction is related to the position, or if the conduct was particularly egregious.*

*Arrest records are treated slightly differently. While a conviction record constitutes reliable evidence that a person engaged in the conduct alleged (i.e., convictions require proof “beyond a reasonable doubt”), an arrest without a conviction does not establish that a person actually engaged in misconduct. Thus, when a policy or practice of rejecting applicants based on arrest records has a disparate impact on a protected class, the arrest records must not only be related to the job at issue, but the employer must also evaluate whether the applicant or employee actually engaged in the misconduct. It can do this by giving the person the opportunity to explain and by making follow-up inquiries necessary to evaluate his/her credibility.*

*Other employment policies that relate to off-the-job employee conduct also are subject to challenge under the disparate impact approach, such as policies related to employees’ credit history. People of color have also challenged, under the disparate impact theory, employer policies of discharging persons whose wages have been garnished to satisfy creditors’ judgments.*