**CRIMINAL BACKGROUND CHECKS**

In 2012, the federal government published a study that showed that there had been a major increase in the number of Americans with criminal records.[[1]](#footnote-1) Between 1974 and 2001, the number of former prisoners living in the United States had more than doubled from 1,603,000 to 4,299,000. The study concluded that if incarcerations do not increase, approximately 6.6% of all persons born in the United States in 2001 will serve time in prison during their lifetime.

When individuals are released from prisons and jail, their ability to find a job and a place to live is critical to their successful reentry into society. The use of criminal background checks has become more and more common among both employers and landlords. While the use is certainly lawful, as will be discussed below, both employers and landlords are prohibited from adopting a policy whereby an applicant with a criminal history is automatically disqualified.

**Employment**

Federal law prohibits employment discrimination based on race, religion, sex or national origin. We all understand that the law prohibits an employer from letting these factors enter into their hiring or firing decisions. What employers may not understand, however, is that this law also prohibits an employer from basing its decision on a factor that appears to be neutral on its fact, but which disproportionately impacts on a protected class of persons. This rule of law can be perhaps easiest understood by examining the facts of a U.S. Supreme Court case decided back in 1971. The case involved a North Carolina power company that had adopted a requirement that job applicants have a high school diploma. A much higher percentage of the white job seekers in the area at this time had a high school degree and thus the requirement had a disproportionate impact on minority job applicants.[[2]](#footnote-2) Since the diploma requirement operated to disqualify minority applicants, it was only permissible if the Company could show that the diploma requirement was significantly related to job performance. The power company could not do that so the policyrequirement was held to be unlawful. In its decision the United States Supreme Court made clear that it did not matter if the power company had adopted the diploma requirement with the intent to discriminate against minorities:

. . . good intent or absence of discriminatory intent does not redeem employer procedures or testing mechanisms that operate as “built in headwinds for minority groups and are unrelated to measuring job capability.

The EEOC looks at an employer’s use of an individual’s criminal history in making employment decisions the same way. It is true that, of course, an employer cannot treat criminal history information different for different applicants based on their race or national origin. But the EEOC also says that national data shows that fairly neutral criminal records exclusions have a disproportionate impact based on race and national origin. African Americans and Hispanics are arrested at a rate that is 2 to 3 times the proportion of the general population. One in seventeen white men are expected to serve time in prison during their lifetime. The rate climbs to 1 in 6 for Hispanic men and to 1 in 3 for African American men. [[3]](#footnote-3) [[4]](#footnote-4) Such requirements will be deemed to violate the law if not job related.

* An employer cannot simply adopt a policy that disqualifies any job applicant with a conviction for any crime.
* An exclusion based upon a conviction must be job related for the position in question. Employers must consider the following factors:

1. The nature and gravity of the offense;
2. The time that has passed since the offense and/or completion of the sentence;
3. The nature of the job sought.

* An exclusion based on an arrest (rather than a conviction) is never permissible.
* Employers are encouraged to provide for “individualized assessments” where the individual is given notice that he/she has been screened out because of a criminal conviction. The individual is then given an opportunity to demonstrate that the exclusion should not be applied due to his/her particular circumstances, such as:
* Extenuating circumstances about the offense;
* Post-conviction conduct/employment history;
* Rehabilitation;
* Character references.
* Employers may be able to justify excluding individuals from particular positions for specified criminal conduct.
* Employers are encouraged to limit inquiries to records for which exclusions would be job related for the position in question.

**Housing**

Like the EEOC, HUD has also published guidelines in which it has indicted that a criminal history policy can have a disproportionate impact on racial and ethnic minorities.[[5]](#footnote-5) While HUD left open the door for a particular landlord to offer evidence to refute that claim in the context of a particular market, it is quite clear that this would be an uphill battle.

If a policy does have a disproportional impact on minorities, then the landlord must show that the policy is nonetheless justified. Presumably, the landlord or property manager would assert that the policy is necessary for the protection of other residents on their property.

* A landlord cannot exclude individuals because of one or more prior arrests (without any conviction).
* A landlord cannot impose a blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the alleged conduct entailed or what the convicted person has done since then.
* Landlord’s policy must be distinguished between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.
* Law allows blanket rule exclusion of individuals that have been convicted for drug manufacture or distribution (not possession) so long as the rule was applied to all applicants regardless of race.

**Conclusion**

Policies that exclude persons based on criminal histories must be narrowly tailored. For example, it may be reasonable to disqualify a person with an embezzlement conviction form being considered for a bookkeeping position, but not to deny this same person the right to rent an apartment. And a person with a 30-year-old assault charge should not be treated the same as a person with a multiple recent assault convictions. This is particularly true if the person has had a clear record for the 30 years since his conviction, during which time he has been a productive member of society.

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1. Bureau of Justice Statistics, U.S. Dep’t of Justice, *Prevalence of Imprisonment in the U.S. Population* (2003). [↑](#footnote-ref-1)
2. 42 USC §2000e. [↑](#footnote-ref-2)
3. *Griggs v Duke Pair Co*, 401 US 424 (1971). [↑](#footnote-ref-3)
4. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [↑](#footnote-ref-4)
5. Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate Related Transactions (2016). [↑](#footnote-ref-5)