EEOC GUIDELINES & CRIMINAL HISTORY

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Employers routinely ask questions about an applicant's criminal history and sometimes conduct criminal history background checks. The reasons that law enforcement employers do so is apparent, but other employers have concerns about employee performance, theft, and violent tendencies that might be identified through a criminal background check. An overriding concern from a risk management standpoint is the potential for a negligent hiring lawsuit should an unexamined hire assault or steal from a third party or fellow employee.

NEGLIGENT HIRING

rdinarily an employer is liable for the torts committed by its employee if the employee is acting in the scope and course of his employment. An exception is where the employer acted negligently in hiring the employee. In that case the employer may be held liable even for acts outside the course and scope of employment. Clearly employers should take reasonable steps to examine whether the person they are hiring might present a risk of engaging in tortious conduct while on the job.

An employer may be liable for harm caused by an incompetent or unfit employee if (1) the employer knew, or in the exercise of ordinary care, should have known that the employee was unfit; and (2) retaining the employee was a proximate cause of the plaintiff's injury.[1] The employer's duty, however, is limited to foreseeable victims, and then only "to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others."[2]

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[1] *Carlsen v. Wackenhut Corp.*, 73 Wn.,App. 247, 252–53, 868 P.2d 882 (1994) (*citing Peck v. Siau*, 65 Wn. App. 285, 288, 827 P.2d 1108 (1992); *Guild v. Saint Martin's Coll.*, 64 Wn. App. 491, 498–99, 827 P.2d 286 (1992)).

[2] *Betty Y. v. Sameeh Al–Hellou, Gibson and Wise Real Estate Investments, Inc.*, 98 Wn. App. 146, 149, 988 P.2d 1031 (1999), *review denied*, 140 Wn.2d 1022, 10 P.3d 403 (2000) (*citing Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997)).

The type of background check an employer should conduct, then, is related to the job and the potential for a person performing that job to commit a particular type of tort. The driving record of a person applying to drive a garbage truck, for example, would be important. Where an employee is to work in a position of apparent authority or to have access to vulnerable persons, it is particularly important for an employer to consider a criminal history check. In determining the reasonableness of a background investigation of a potential employee, if there is a likelihood of subjecting third persons to harm, a higher degree of care is required.[3]

In *Carlsen*, a part-time security guard at a Tacoma Dome rock concert attacked a teenage female concert goer.[4] The court held the employer could be liable for assault because: (1) the assault occurred on the work premises; (2) the guard was on the job when he contacted the victim; and (3) the victim approached the guard for information because of the guard's position.[5] Thus, the guard's job enabled and was closely connected to the assault.[6] The court reversed summary judgment in favor of the employer because the employer did not conduct a background check, contacted no references, and did not investigate inconsistent statements in the job application.[7]

A different situation was presented in *Betty Y.*, where the court judged the likelihood of harm to third persons as low when the employer hired a manual laborer to rehabilitate vacant

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[3] *Carlsen v. Wackenhut*, 73 Wn. App. at 256.

[4] *Carlsen*, 73 Wn. App. at 248–49, 868 P.2d 882.

[5] *See generally Carlsen*, 73 Wn. App. at 256–57, 868 P.2d 882 (the victim felt comfortable asking a security guard to escort her under the bleachers).

[6] *Carlsen*, 73 Wn. App. at 256, 868 P.2d 882.

[7] *Carlsen*, 73 Wn. App. at 249–251.

apartments.[8] The laborer befriended a young neighborhood boy and later assaulted the boy.[9] The court concluded that the employer was not liable because the laborer was: (1) not hired to work with potential victims; (2) the rape did not occur on the work premises; and (3) most importantly, the job duties did not facilitate or enable the defendant to commit the rape.[10]

Where there is a likelihood of subjecting third persons to harm, a court will examine the processes used by the employer in making a hiring decision. In *Scott*, the parents sued the school for negligently hiring a teacher.[11] After the teacher started working at the school, he had a sexual relationship with their daughter. Before hiring the teacher, the school contacted each of his previous employers and conducted more than one interview with him.[12] The court concluded that "[a]lthough certain specific questions identified by the Scotts were not asked, the process appears sufficient as a matter of law to discover whether an individual is fit to teach" at the school, and affirmed summary judgment.[13]

In contrast, where little effort is made to vet an employee with access to vulnerable persons, an employer will likely be liable for negligent hiring. In *Aulerich*, a man who drove a "cabulance," providing nonemergency medical transportation services for individuals with disabilities, was fired for harassing female coworkers. He had sexually harassed a co-worker, inappropriately hugged the mother of a co-worker, sought a date from a married woman while on duty, and admitted he could no longer see his daughter because he had been accused of sexually

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[8] *Betty Y.*, 98 Wn. App. at 148, 988 P.2d 1031.

[9] *Betty Y.*, 98 Wn. App. at 148, 988 P.2d 1031.

[10] *Betty Y.*, 98 Wn. App. at 150, 988 P.2d 1031.

[11] *Scott v. Blanchet High School*, 50 Wn. App. 37, 747 P.2d 1124 (1987)

[12] *Scott*, 50 Wn. App. at 38–39.

[13] *Scott*, 50 Wn. App. at 43.

molesting her. Aulerich sought similar employment with a different employer and indicated on his application that he had been "downsized" but still worked part time at his previous employer. The new employer interviewed him for 30 to 40 minutes, checked his driving record, and claimed to have called his previous employer and been told only the date he started employment there. The previous employer denied receiving such a call and claimed they would have confirmed that Aulerich no longer worked for them. It was undisputed that the new employer did not check any other references or verify whether he was still employed or his dates of employment with his previous employer. While working for his new employer Aulerich he sexually assaulted an elderly woman who suffered from Addison's disease and firbromyalgia. The court distinguished the hiring of Aulerich from the *Scott* case, where the employer conducted extensive interviews and reference checks, and found that the employer could be liable for negligent hiring.

While a criminal records check may not be essential to avoiding negligent hiring claims in every case, it is an invaluable tool for employers in screening potential hires. Public employers may have a particular need to vet applicants for a criminal past because public employees enjoy "official" status and inspections or responses to problems or emergencies can place public employees in private homes in the course of their duties.

USING CRIMINAL HISTORY IN THE EMPLOYMENT DECISION IN WASHINGTON.

Washington law directly addresses when a public employer may consider felony criminal history in making a hiring decision.[14] A person may not be disqualified from employment

[14] Chapter 9.96A RCW, Restoration of Employment Rights.

"solely because of a prior conviction of a felony."[15] The basic rule is that the conviction must be less than ten years old and directly relate to the position of employment sought.[16]

9.96A.020 Employment, occupational licensing by public entity — Prior felony conviction no disqualification — Exceptions.

(1) Subject to the exceptions in subsections (3) through (5) of this section, and unless there is another provision of law to the contrary, a person is not disqualified from employment by the state of Washington or any of its counties, cities, towns, municipal corporations, or quasi-municipal corporations, nor is a person disqualified to practice, pursue or engage in any occupation, trade, vocation, or business for which a license, permit, certificate or registration is required to be issued by the state of Washington or any of its counties, cities, towns, municipal corporations, or quasi-municipal corporations solely because of a prior conviction of a felony. However, this section does not preclude the fact of any prior conviction of a crime from being considered.

(2) A person may be denied employment by the state of Washington or any of its counties, cities, towns, municipal corporations, or quasi-municipal corporations, or a person may be denied a license, permit, certificate or registration to pursue, practice or engage in an occupation, trade, vocation, or business by reason of the prior conviction of a felony if the felony for which he or she was convicted directly relates to the position of employment sought or to the specific occupation, trade, vocation, or business for which the license, permit, certificate or registration is sought, and the time elapsed since the conviction is less than ten years. However, for positions in the county treasurer's office, a person may be disqualified from employment because of a prior guilty plea or conviction of a felony involving embezzlement or theft, even if the time elapsed since the guilty plea or conviction is ten years or more.

(3) A person is disqualified for any certificate required or authorized under chapters 28A.405 or 28A.410 RCW, because of a prior guilty plea or the conviction of a felony crime specified under RCW 28A.400.322, even if the time elapsed since the guilty plea or conviction is ten years or more.

(4) A person is disqualified from employment by school districts, educational service districts, and their contractors hiring employees who will have regularly scheduled unsupervised access to children, because of a prior guilty plea or conviction of a felony crime specified under RCW 28A.400.322, even if the time elapsed since the guilty plea or conviction is ten years or more.

(5) The provisions of this chapter do not apply to issuance of licenses or credentials for professions regulated under chapter 18.130 RCW.

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[15] RCW 9.96A.020(1).

[16] RCW 9.96A.020. There are specific statutes allowing or requiring criminal records checks of persons seeking employment involving unsupervised access to children, or developmentally disabled persons, or other vulnerable adults. RCW 43.43.832

(6) Subsections (3) and (4) of this section as they pertain to felony crimes specified under RCW 28A.400.322(1) apply to a person applying for a certificate or for employment on or after July 25, 1993, and before July 26, 2009. Subsections (3) and (4) of this section as they pertain to all felony crimes specified under RCW 28A.400.322(2) apply to a person applying for a certificate or for employment on or after July 26, 2009. Subsection (5) of this section only applies to a person applying for a license or credential on or after June 12, 2008.

Law enforcement jobs are excluded from the scope of chapter 9.96A RCW:

9.96A.030 Exclusion — Law enforcement agencies.

This chapter shall not be applicable to any law enforcement agency; however, nothing herein shall be construed to preclude a law enforcement agency in its discretion from adopting the policy set forth in this chapter.

As are persons dealing with children and vulnerable adults:

9.96A.060 Exclusion — Employees dealing with children or vulnerable persons.

This chapter is not applicable to the department of social and health services when employing a person, who in the course of his or her employment, has or may have unsupervised access to any person who is under the age of eighteen, who is under the age of twenty-one and has been sentenced to a term of confinement under the supervision of the department of social and health services under chapter 13.40 RCW, who is a vulnerable adult under chapter 74.34 RCW, or who is a vulnerable person. For purposes of this section "vulnerable person" means an adult of any age who lacks the functional, mental, or physical ability to care for himself or herself.

Public officers who convicted of a felony in office forfeit that office and are barred from holding a public office in the future.[17]

[17] *See* RCW 9.92.120. ("The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his or her office, and shall disqualify him or her from ever afterward holding any public office in this state."). A holding of Division Three of the Court of Appeals may have expanded the definition of "public officer" to include deputies. *See Lee ex rel. Office of Grant County Prosecuting Attorney v. Jasman*, --- P.3d ----, 2014 WL 4086304 (2014) (conviction of deputy coroner for conduct engaged in while elected coroner barred him from holding office of deputy coroner).

During the last legislative session a bill was introduced that would have amended chapter 49.44 RCW to prohibit employers from asking about arrests and other non-conviction data prior to determining that the applicant is otherwise qualified for the job.[18]

Polygraph Tests

Both federal[19] and state[20] law limit the use of polygraph tests in the employment context; the federal law, however, does not apply to public employers, whereas the state law does. State law makes it unlawful for the state or a political subdivision of the state "to require, directly or indirectly, that any employee or prospective employee take or be subjected to any lie detector or similar test as a condition of employment or continued employment."[21] There are three exceptions to the prohibition: persons taking the initial application for employment with a law enforcement agency: the employment of persons who manufacture, distribute, or dispense controlled substances; and persons in sensitive positions directly involving national security.

Washington Law Against Discrimination

The Washington Law Against Discrimination does not create a protected class for persons who have been arrested for or convicted of a crime.[22] The Washington State Human

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[18] HB 2545.

[19] Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 et seq.

[20] RCW 49.44.120.

[21] RCW 49.44.120.

[22] *See* RCW 49.60.180:

> It is an unfair practice for any employer:
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> (1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a

Rights Commission's regulations, however, prescribe the permissible types of pre-employment inquiries regarding arrests and convictions.[23]

Arrests:

> Because statistical studies regarding arrests have shown a disparate impact on some racial and ethnic minorities, and an arrest by itself is not a reliable indication of criminal behavior, inquiries concerning arrests must include whether charges are still pending, have been dismissed, or led to conviction of a crime involving behavior that would adversely affect job performance, and the arrest occurred within the last ten years. Exempt from this rule are law enforcement agencies and state agencies, school districts, businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults. See RCW 43.20A.710; 43.43.830 through 43.43.842; and RCW 72.23.035.

Convictions:

> Statistical studies on convictions and imprisonment have shown a disparate impact on some racial and ethnic minority groups. Inquiries concerning convictions (or imprisonment) will be considered to be justified by business necessity if the crimes inquired about relate reasonably to the job duties, and if such convictions (or release from prison) occurred within the last ten years. Law enforcement agencies, state agencies, school districts, businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults are exempt from this rule. See RCW 43.20A.710; 43.43.830 through 43.43.842; and RCW 72.23.035.

The Commission's rule mostly follows RCW 9.96A.020, except that it permits the ten year period to run either from the date or conviction or release from imprisonment. Public employers should follow the RCW, which uses the conviction date as the starting point for the ten year period. An attempt by the Commission to make it an unfair employment practice to discriminate

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> person with a disability, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation. . . .

[23] WAC 162-12-140.

against a person convicted of a crime except in narrow circumstances was invalidated by the Washington Court of Appeals.[24]

Equal Opportunity Employment Commission Guidelines

Title VII prohibits employers from treating applicants and employees with similar criminal records differently because of race, color, national origin, religion, or sex. It does not prohibit an employer from considering arrests or convictions in making a hiring decision. However, an employer still may not take an employment action that has a disparate impact on a protected group: A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity

In 2012, the U.S. Equal Employment Opportunity Commission (EEOC) updated its guidance on the use of criminal records in employment decisions.[25] These guidelines are not binding on employers and you should seek the advice of legal counsel before relying on the guidelines in making decisions regarding whether the use of an arrest or conviction in an employment decision violates Title VII or another law, such as the Washington Law Against Discrimination.

When utilizing criminal history in the hiring process, the lesson of the guidelines is to avoid blanket policies and look at the specific facts of individual cases. Be sure that the use of criminal history is related to the job and identify essential job functions. If a law requires the

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[24] *Gugin v. Sonico*, 68 Wn. App. 826, 846 P.2d 571 (1993).

[25] The full text of the guidelines can be found online at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

employer to consider criminal history, for example in jobs dealing with vulnerable persons, an employer is generally going to fall within the guidelines.

Make a distinction between arrest and conviction records, because an arrest does not mean that the person was convicted of a crime. Also, arrest records tend to be less accurate than conviction records. An employer can conduct a subsequent investigation into the facts underlying the arrest.

Be sure that the consideration of criminal history is truly job related and consistent with business necessity. At a minimum, an employer should consider three factors: (1) the nature and gravity of the crime, (2) the time elapsed since the conviction and/or completion of the sentence, and (3) the nature of the job.[26] The EEOC also prefers that an employer include an "individualized assessment," where individuals are provided an opportunity to demonstrate that disqualifying them from being hired is unwarranted based on the circumstances or other mitigating factors.

The EEOC guidelines are not the law, but only the recommendations of one agency. The EEOC has not been particularly successful to date in enforcing the guidelines.[27] The Guidelines have been criticized as applying incorrect statistical standards, ignoring the "solid business

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[26] These three factors are known as the "Green factors," were set forth in a decision by the Eighth Circuit in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977).

[27] *See* "EEOC's Failure to Show Disparate Impact Dooms Credit Check Bias Case, Court Affirms," BLOOMBERG BNA, April 11, 2014 (citing a "string of losses for the EEOC in its litigation efforts regarding potential discrimination against blacks, Hispanics and men resulting from employers' use of credit and criminal background checks in hiring"). Online at http://www.bna.com/eeocs-failure-show-n17179889528/.

reasons" to consider criminal history, and imposing too broad a policy that does not consider differences in the labor market.[28]

A copy of the EEOC's "Questions and Answers" about the Guidelines is attached.

[28] Conor and White, "The Consideration of Arrest and Conviction Records in Employment Decisions: A Critique of the EEOC Guidance," 43 SETON HALL LAW REVIEW 971 (2013).

U.S. Equal Employment Opportunity Commission

Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, 42 U.S.C. § 2000e. The Guidance consolidates and supersedes the Commission's 1987 and 1990 policy statements on this issue as well as the discussion on this issue in Section VI.B.2 of the Race & Color Discrimination Compliance Manual Chapter. It is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

1. How is Title VII relevant to the use of criminal history information?

There are two ways in which an employer's use of criminal history information may violate Title VII. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin ("disparate treatment discrimination").

Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.

2. Does Title VII prohibit employers from obtaining criminal background reports about job applicants or employees?

No. Title VII does not regulate the acquisition of criminal history information. However, another federal law, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (FCRA), does establish several procedures for employers to follow when they obtain criminal history information from third-party consumer reporting agencies. In addition, some state laws provide protections to individuals related to criminal history inquiries by employers.

3. Is it a new idea to apply Title VII to the use of criminal history information?

No. The Commission has investigated and decided Title VII charges from individuals challenging the discriminatory use of criminal history information since at least 1969,[1] and several federal courts have analyzed Title VII as applied to criminal record exclusions over the past thirty years. Moreover, the EEOC issued three policy statements on this issue in 1987 and 1990, and also referenced it in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the Commission's E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color discrimination in the workplace. Thus, applying Title VII analysis to the use of criminal history information in employment decisions is well-established.

4. Why did the EEOC decide to update its policy statements on this issue?

In the twenty years since the Commission issued its three policy statements, the Civil Rights Act of 1991 codified Title VII disparate impact analysis, and technology made criminal history information much more accessible to employers.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pennsylvania Transportation Authority*[2] decision that the Commission should provide in-depth legal analysis and updated research on this issue. Since then, the Commission has examined social science and criminological research, court decisions, and information about various state and federal laws, among other information, to further assess the impact of using criminal records in employment decisions.

5. Did the Commission receive input from its stakeholders on this topic?

Yes. The Commission held public meetings in November 2008 and July 2011 on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. The Commission received and reviewed approximately 300 public comments that responded to topics discussed during the July 2011 meeting. Prominent organizational commenters included the NAACP, the U.S. Chamber of Commerce, the Society for Human Resources Management, the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners' Project.

6. Is the Commission changing its fundamental positions on Title VII and criminal record exclusions with this Enforcement Guidance?

No. The Commission will continue its longstanding policy approach in this area:

- The fact of an arrest does not establish that criminal conduct has occurred. Arrest records are not probative of criminal conduct, as stated in the Commission's 1990 policy statement on Arrest Records. However, an employer may act based on evidence of conduct that disqualifies an individual for a particular position.
- Convictions are considered reliable evidence that the underlying criminal conduct occurred, as noted in the Commission's 1987 policy statement on Conviction Records.
- National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.
- A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by federal law.

7. How does the Enforcement Guidance differ from the EEOC's earlier policy statements?

The Enforcement Guidance provides more in-depth analysis compared to the 1987 and 1990 policy documents in several respects.

- The Enforcement Guidance discusses disparate treatment analysis in more detail, and gives examples of situations where applicants with the same qualifications and criminal records are treated differently because of their race or national origin in violation of Title VII.
- The Enforcement Guidance explains the legal origin of disparate impact analysis, starting with the 1971 Supreme Court decision in Griggs v. Duke Power Company, 401 U.S. 424 (1971), continuing to subsequent Supreme Court decisions, the Civil Rights Act of 1991 (codifying disparate impact), and the Eighth and Third Circuit Court of Appeals' decisions applying disparate impact analysis to criminal record exclusions.
- The Enforcement Guidance explains how the EEOC analyzes the "job related and consistent with business necessity" standard for criminal record exclusions, and provides hypothetical examples interpreting the standard.
  - There are two circumstances in which the Commission believes employers may consistently meet the "job related and consistent with business necessity" defense:
    - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
    - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).
- The Enforcement Guidance states that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provide a defense to a Title VII claim.
- The Enforcement Guidance says that state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.
- The Enforcement Guidance provides best practices for employers to consider when making employment decisions based on criminal records.

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[1] *See, e.g.*, EEOC Decision No. 70-43 (1969) (concluding that an employee's discharge due to the falsification of his arrest record in his employment application did not violate Title VII); EEOC Decision No. 72-1497 (1972) (challenging a criminal record exclusion policy based on "serious crimes"); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978)

(concluding that an employee's discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct).

[2] 479 F.3d 232 (3d Cir. 2007).