

# EEOC - Arrest Records & High School Diplomas

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.



Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages and benefits.

Below, two important EEOC current hot topics are reviewed and discussed in a Q&A format.

## WHAT YOU SHOULD KNOW ABOUT THE EEOC AND ARREST AND CONVICTION RECORDS

### 1) *Does the EEOC guidance prohibit employers from obtaining and using criminal background reports about job applicants or employees?*

No. The EEOC does not have the authority to prohibit employers from obtaining or using arrest or conviction records. The EEOC simply seeks to ensure that such information is not used in a discriminatory way.

### 2) *How could an employer use this information in a discriminatory way?*

There are two ways in which an employer's use of criminal history information may be discriminatory. First, the relevant law, Title VII of the Civil Rights Act of 1964, prohibits employers from treating job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic (disparate treatment discrimination).



Second, the law also prohibits disparate impact discrimination. This means that, if criminal record exclusions operate to disproportionately exclude people of a particular race or national origin, the employer has to show that the exclusions are "job related and consistent with business necessity" under Title VII to avoid liability.

### 3) *How would an employer prove "job related and consistent with business necessity?" Is it burdensome?*

Proving that an exclusion is "job related and consistent with business necessity" is not burdensome. The employer can make this showing if, in screening applicants for criminal conduct, it (1) considers at least the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question, and (2) gives an applicant who is excluded by the screen the opportunity to show why he should not be excluded.

### 4) *Is the EEOC guidance a new Commission policy?*

No. The Guidance follows the text of the law about disparate treatment and disparate impact discrimination. Since at least 1969, the Commission has received, investigated, and resolved discrimination charges involving criminal records exclusions, and federal courts have analyzed the civil rights law as applied to criminal record exclusions since the 1970s.

### 5) *Why update this policy now?*

In the twenty years since the Commission issued its three policy statements, there have been important legal and social changes. In 1991, Congress amended the Civil Rights Act to add Title VII disparate impact analysis, among other things. Since the 1990s, technology has made criminal history information much more accessible to employers. The number of working-aged individuals with criminal records in the population significantly increased during this period, especially in the African American and Hispanic communities.

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**6) Did the Commission receive input from advocates, the business community and the public on this topic?**

Yes. Representatives of employers, individuals with criminal records, and other federal agencies testified at public EEOC meetings in November 2008 and July 2011. The Commission also received and reviewed approximately 300 written comments from members of the general public and stakeholder groups that responded to topics discussed during the July 2011 meeting. The stakeholders that provided statements to express their interests and concerns include prominent organizations such as the NAACP, the U.S. Chamber of Commerce, the Society for Human Resource Management (SHRM), 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, among others.



**2) Are you telling people that they are protected by the ADA if they decide not to graduate from high school? Wouldn't this create a disincentive to finish high school?**

No. The ADA only protects someone whose disability makes it impossible for him or her to get a diploma. It would not protect someone who simply decided not to get a high school diploma.

Employers may continue to have high school diploma requirements and, in the vast majority of cases, they will not have to make exceptions to them. However, if an applicant tells an employer she cannot meet the requirement because of a disability, an employer may have to allow her to demonstrate the ability to do the job in some other way. This may include considering work experience in the same or similar jobs, or allowing her to demonstrate performance of the job's essential functions. The employer can require the applicant to demonstrate, perhaps through appropriate documentation, that she has a disability and that the disability actually prevents her from meeting the high school diploma requirement.

**WHAT YOU SHOULD KNOW ABOUT THE EEOC AND HIGH SCHOOL DIPLOMA REQUIREMENTS**

On November 17, 2011, the EEOC issued an informal discussion letter about how the Americans with Disabilities Act (ADA) applies to qualification standards for jobs. There has been significant commentary and conjecture about the meaning and scope of the letter. The following questions and answers are meant to clarify these issues.

**1) Have you just made it illegal for businesses to require a high school diploma?**

No. Nothing in the letter prohibits employers from adopting a requirement that a job applicant have a high school diploma. However, an employer may have to allow someone who says that a disability has prevented him from obtaining a high school diploma to demonstrate qualification for the job in some other way.



**3) So, does that mean the employer must hire the person with a disability?**

No. Even if the applicant with a disability can demonstrate the ability to do the job through some means other than possession of a high school diploma, the employer may still choose the best qualified person for the job. The employer does not have to prefer the applicant with a disability over someone who can perform the job better.

**4) Is the informal discussion letter a new interpretation of the law?**

No. Like all of EEOC's informal discussion letters, the letter simply applies the existing standards under the ADA and the EEOC's regulations. The EEOC's informal discussion letters are meant to provide assistance for employers in complying with the laws. In this case the letter was intended to explain how the ADA applies when any job requirement (although a high school diploma was the specific example that we were asked about) excludes someone with a disability from a job.