

Employment Practices *Update*

Bringing important information to emergency service organizations

VOLUME 14 • NUMBER 1



EEOC's guidance on criminal background checks: *Game changing*

By Michael J. McCall, J.D.

Emergency services organizations (ESOs) may be under the impression that criminal background screening processes are straightforward for pre-employment or selection of volunteers. However, the federal Equal Employment Opportunity Commission (EEOC) has changed the ways organizations are asked to approach hiring and selection programs. It's important for ESO leaders to be aware of their new responsibilities and possible legal ramifications for doing business as usual

The game changing event occurred in March 2012 when the EEOC issued Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. Although not a law or legally enforceable regulation, the Enforcement Guidance has challenged organizations to make necessary alterations to their hiring and selection policies and practices.

Past Practices

Generally, ESOs have felt comfortable asking prospective employees and volunteers about whether they have criminal records. Many typical applications for employment or membership asked, "Have you ever been

convicted of a crime? If so, please provide details."

Criminal background checks may reveal prior arrests or convictions, sometimes dating back five, 10 or even more years. It has been customary for ESOs to take information related to an applicant's criminal background and thereafter deny an offer of employment or membership based on that information.

The EEOC's Concern

Not off the hook if an ESO member quits – The EEOC is interested in the prevention of hiring and selection policies and practices that result in discrimination – most commonly based on race or national origin, but also sex (gender) or religion. Pertaining to criminal records, there is discrimination known as disparate impact liability, where evidence shows that a criminal background screening policy or practice disproportionately screens out a legally protected group and the employer doesn't satisfactorily demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.

The EEOC warns organizations that criminal records findings that exclude applicants automatically based on a criminal history may disproportionately discriminate against persons due to their race and national origin.

Photocopying or transferring this document is a violation of federal copyright law and is prohibited without the express written consent of VFIS.

VFIS does not offer legal advice. Readers should seek the advice of an employment attorney regarding any legal questions.

We welcome comments, suggestions and questions from our readers.

E-mail: epupdate.opinion@vfis.com



Published by the
Glatfelter Insurance Group
York, Pennsylvania

Continued on page 2

Avoid blanket exclusionary policies (unless required by state or federal law). Further examination into the individual applicant's criminal history is advised.

Narrowed and Targeted Analysis for Screening

Once an ESO accepts that applicants don't have to be automatically disqualified because of a former arrest or conviction of a crime, the next step is to understand what more narrowed and targeted analysis is recommended according to the EEOC's Enforcement Guidance.

If an organization's hiring or selection policies or practices result in the exclusion of persons with criminal records, the organization must be able to demonstrate the screening process is job related for the position in question and consistent with business necessity. In determining whether the exclusion from employment or membership is job related and consistent with business necessity, analyze three factors:

- 1. The nature and gravity of the offense or conduct.** Assessment of the nature of the offense may hinge on the harm or potential harm caused by the crime. Consideration may be given to the elements of the crime, such as those involving threatening, violent, deceptive, indecent, unsafe or intimidating behavior. Also, felony convictions may be identified as more severe than misdemeanors.
- 2. The amount of time that has passed since the offense, conduct and/or completion of the sentence.** There is no set timeframe to determine whether the offense occurred far enough in the past. The key factor to consider is how much the risk of recidivism declines over a period of time for the particular crimes.
- 3. The nature of the job or position held or sought.** It is advisable to identify and target the particular jobs or positions within the ESO that are excluded by certain criminal histories. Additionally, written and up-to-date job descriptions detail the essential functions of the jobs, including factors like – level of supervision; level of trust and interaction with vulnerable persons; trust and dealings directly with the public; financial

responsibilities; and safety concerns. The public being able to trust the ESO's membership weighs heavily in ensuring ESOs select employees and volunteers that work safely, professionally and with integrity.

Individualized Assessments

The EEOC offers the idea for organizations to conduct "individualized assessments" for those who may otherwise be rejected because of targeted criminal record screenings. This assessment concept provides the organization a way to ensure it is not mistakenly screening out qualified applicants based on incorrect, incomplete, irrelevant information and the applicant is given an opportunity to demonstrate that the exclusion does not apply to him or her. Factors that may be presented by the applicant include, but are not limited to:

- Criminal record information is incorrect.
- Circumstances surrounding the offense or conduct.
- Employment or character references.
- Length and consistency of employment history before and after the offense or conduct.
- Rehabilitation efforts, such as education or training.

What About Arrests?

One of the most potentially confusing aspects of the EEOC's Enforcement Guidance involves an applicant's arrest record. The EEOC contends that an arrest is not proof of criminal conduct, because many arrests do not result in

If an organization's hiring or selection policies or practices result in the exclusion of persons with criminal records, the organization must be able to demonstrate the screening process is job related for the position in question and consistent with business necessity.

criminal charges or the charges are dismissed. Further, a person charged and prosecuted will be presumed innocent until proven guilty.

Even though an arrest record standing alone may not be used to deny an employment or membership opportunity, an ESO may make its selection decision based on the conduct underlying the arrest if the conduct makes the individual

unfit for the position in question. Thus, the conduct and not the arrest, is considered relevant for membership purposes.

Conclusion

Tremendous responsibilities rest with those ESO professionals tasked with administrative and human resources functions. Hiring and selection policies and practices once deemed straightforward, now require more detailed analysis. Ongoing training should be offered to all persons responsible for hiring and selection to ensure compliance with applicable federal, state and local laws.

