**Employment Discrimination**

**Use of Criminal Background Checks in Hiring Practices**

For many people, the most impactful barrier to employment is the criminal record. Many employers use criminal records as a way to narrow the applicant pool to whom the employer deems most qualified. However, some uses of criminal backgrounds might violate Title VII of the Civil Rights Act of 1964.[[1]](#footnote-1)

The Equal Employment Opportunity Commission has outlined its position on the use of criminal records in the hiring process [here](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VIII). Discrimination can occur in two ways: Disparate Treatment or Disparate Impact. Disparate Treatment is when an employer uses the fact that the applicant is a member of a protected class (i.e. African American) as the basis not to hire. Disparate Impact is when the employer uses a would-be neutral policy that has discriminating effects for a protected class.

So how does the use of criminal background checks become a disparate impact? African American men are seven times more likely to face imprisonment than white men. Latinos are twice as likely to face imprisonment as white men. Numbers are elevated, though at different rates, across the spectrum with regard to criminal records, including arrests, convictions, drug convictions, felonies, misdemeanors, etc.[[2]](#footnote-2) Because these protected classes are impacted at a greater rate by the use of criminal records, disparate impact can be found.

In general, if a policy has a disparate impact on a Title VII protected group, the employer must demonstrate that the policy is job-related for the positions in question. The United States Court of Appeals for the Eighth Circuit, which includes Arkansas, lists three factors in considering whether the policy is job-related:

The time that has passed since the offense or conduct and/or completion of the sentence,

The nature and gravity of the offense or conduct and

The nature of the job held or sought.[[3]](#footnote-3)

Each claim of disparate impact discrimination based on criminal background checks will be based on the examination of the policy. That examination will be on a case-by-case basis. However, the broader the policy, the more likely it will violate the law.

If you believe you have been wrongfully denied employment because of a criminal background check and you are a member of a protected class, you can file a charge with the EEOC [here](https://www.eeoc.gov/employees/charge.cfm). You must file a charge with the EEOC before moving forward with a lawsuit on your own or with the assistance of an attorney.[[4]](#footnote-4)

1. 42 U.S. Code § 2000, *et seq.*  [↑](#footnote-ref-1)
2. <https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VIII> See footnotes 65-74. [↑](#footnote-ref-2)
3. Green v. Missouri Pacific Railroad, 523 F.2d 1290, (8th Cir. 1975). [↑](#footnote-ref-3)
4. 42 U.S. Code § 2000e-5(f) [↑](#footnote-ref-4)