

## Criminal Background Checks Remain On EEOC's Radar

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Although not an official opinion or interpretation, the EEOC just released discussion letters giving another peak behind the curtain as to the agency's stance on criminal background discrimination. Answering the letter of an incarcerated veteran who anticipated having a tough time finding employment upon his release, the EEOC, through its Assistant Legal Counsel, reiterated that "[e]xcluding people from employment due to criminal records may raise issues under Title VII, especially if it disproportionately harms people of a particular race or national origin."

While not banning the use of background checks, the EEOC wrote that if such disproportionality existed, an employer must be able to show that the exclusions must result from a business necessity and that the employer has considered (1) the nature and gravity of the convictions; (2) the time that has passed since the conviction or release from incarceration; and (3) the nature of the job sought. For example, it would be much easier to justify excluding an applicant for a cashier's position who has been convicted of embezzlement than it would be if the same candidate were applying for a job that had nothing to do with handling money.

Beyond this sometimes tricky calculus, the EEOC further asserts that those who may be barred from a position due to their criminal background should have “an opportunity to provide more facts before the employer makes a final decision.” Such an opportunity to provide mitigating facts is part of the “individualized assessment” trumpeted by the agency.

The biggest takeaway from the published letter (which can be [found here](#)) is that this hot button issue is still squarely in the crosshairs of the EEOC, meaning that any automatic criminal background exclusions in your company’s hiring policy ought to generate a phone call with experienced employment counsel.