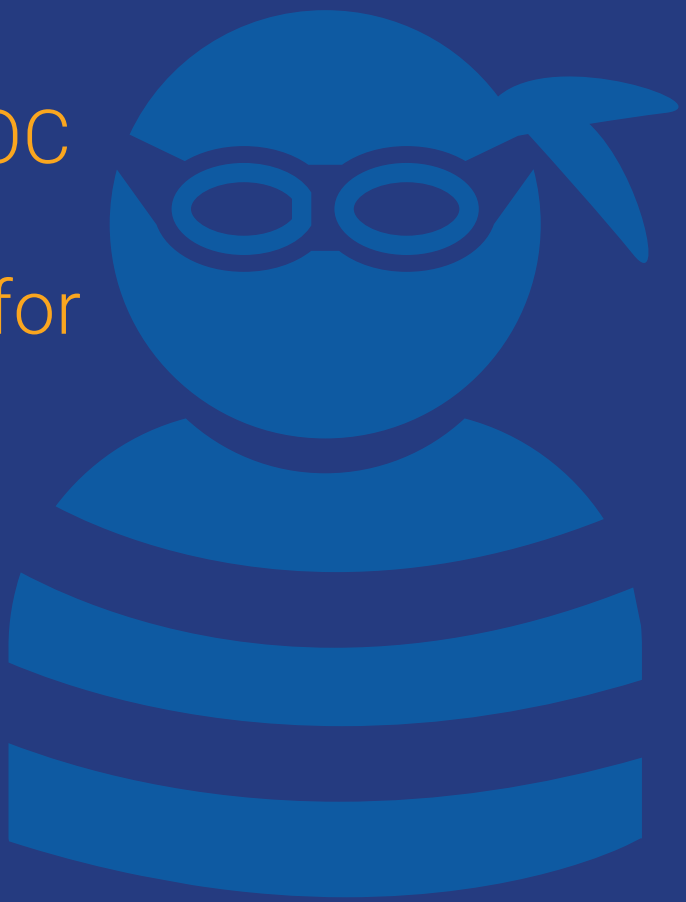
First Advantage

Best Practices for Individualized Assessments

Overview of the EEOC Criminal History Guidance and Tips for Conducting Them



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Executive Summary

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) published guidance relating to an employer's use of arrest and conviction records. The guidance discourages blanket exclusions of individuals who have been convicted of crimes and reminded employers that they should analyze the nature and gravity of the offense, the age of the offense, and the relationship between the job duties and the conviction.

The guidance added a new, never-seen-before recommendation that an employer also conduct an "individualized assessment" or case-by-case assessment to determine if a criminal conviction was job related and consistent with business necessity. Although the guidance discusses that such assessment is not always required, for example, when there is such a "demonstrably tight" nexus between a crime and a job, the interpretation of the EEOC seems to be that those instances are the rare exception. Generally speaking, the individualized assessment gives individuals the opportunity to explain or resolve a criminal history uncovered in a background check.

The goal of the EEOC guidance is to help groups of individuals with higher incarceration rates get jobs for which they are qualified, without being automatically excluded from the candidate pool due to a criminal history.

Yet real specific directions have not been published to help companies navigate this process successfully. The purpose of this guide is to close that gap.

Here, we shed light on the process of conducting an individualized assessment, provide ideas to simplify, document and communicate that process, and then highlight areas where companies are getting into trouble.

What's more, you'll also see benchmarks around what other companies are doing, as this guide also includes results from a November 2015 First Advantage customer survey performed by TechValidate around compliance

Chances of Incarceration

1 in 17 if White
1 in 6 if Hispanic
1 in 3 if Black
At the time the EEOC Guidance was written in April of 2012.

Click here to read the EEOC guidance

Benchmark Insight

Where do you get your HR compliance updates? Most employers in our survey report heavy reliance on legal counsel, but the second most popular source was HR industry resources.

Where HR Gets Legal Updates

Note: this is a multiple-choice question — response percentages may not add up to 100
Source: TechValidate survey of 1337 users of First Advantage

and criminal record usage in the hiring process. With fresh, candid insights from other employers about the individualized assessment process, you can better evaluate your own policy and make informed updates that align your process with industry standards.

No law prohibits criminal background checks. They outline when and how.

A Little History

The EEOC has been clear that while a company may choose to use criminal history as a screening device in employment, Title VII of the Civil Rights Act requires that when a hiring practice—such as a criminal background screen—results in the disproportionate exclusions of a particular group of people it could constitute discrimination.

Since criminal background checks are generally allowed under the law, a potential Title VII violation boils down to two analytic concepts: disparate treatment and disparate impact.

According to the 2012 EEOC Criminal History Enforcement Guidance, disparate treatment occurs when an employer treats an individual differently because of race, national origin, or another protected basis. The guidance provides the following example of disparate treatment:

"There is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record."

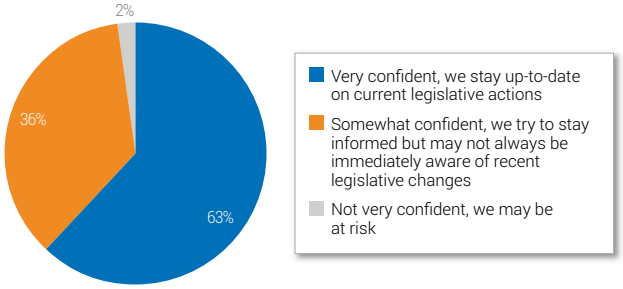
2015 marked 50 years for the EEOC—Title VII of the Civil Rights Act of 1964 created the EEOC to enforce protection. Doors opened July 2, 1965, a year after the Civil Rights Act was signed.

Benchmark Insight

Most employers participating in our compliance survey feel good about their level of HR compliance, with nearly two-thirds feeling "very confident."

HR Compliance Survey

How confident are you that your company is compliant with current federal, state and local pre-employment and hiring laws and guidelines such as Adverse Action, Ban the Box and those enforced by the EEOC?



Source: TechValidate survey of 2016 users of First Advantage

Equally incriminating is disparate impact. This occurs when an "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," according to the guidance.

Victoria Lipnic, EEOC Commissioner, called it a "wise practice" to allow candidates to explain past crimes as part of an individualized assessment, in an article for the Society for Human Resource Management (SHRM). Yet in that same article, she goes on to say that an individual assessment is not always required under Title VII; it depends on the situation and circumstances. For example, she remarked that a day care center would not need an individual assessment of a child molestation conviction before eliminating the individual from consideration.

Basically, an individualized assessment process allows a candidate to provide evidence that a conviction is not related to his or her ability to perform a job and allows employers the opportunity to determine whether a criminal record is specifically related to the position being applied for. Unfortunately, the Guidance provides little to no direction around how to set up a standardized process for performing individualized assessments.

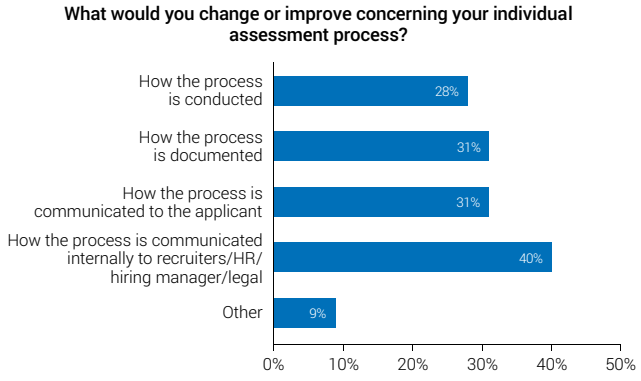
Next up, we offer some information to help you with that process.

Benchmark Insight

According to our compliance survey, the greatest concerns around the individualized assessment process are communicating and documenting internally what has happened.

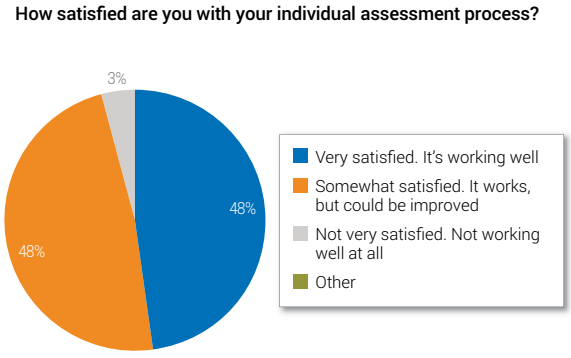
Also, more than half of respondents said the process could be improved.

Improving the Individual Assessment Process



Note: this is a multiple-choice question — response percentages may not add up to 100

Satisfaction with the Process



Performing an Individualized Assessment

Here are a few guidelines to help you create an individualized assessment process or align an existing process with industry standards.

1. Maintain a Written Policy

A policy sets the baseline for what and how your individualized process will take place. In fact, according to our compliance survey, the majority of respondents have a written policy for handling criminal record information, yet a surprising 27 percent do not. Create a policy! Then follow it.

Benchmark Insight

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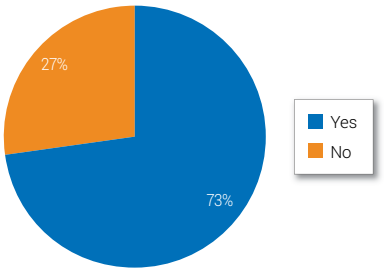
Standard Written Policy?

Do you have a standard written policy for handling criminal history information on job applicants revealed through background screening?



Source: TechValidate survey of 1726 users of First Advantage

2. Consider Creating a Position Specific Matrix to Identify Criminal Records and Ensure Consistency in Application

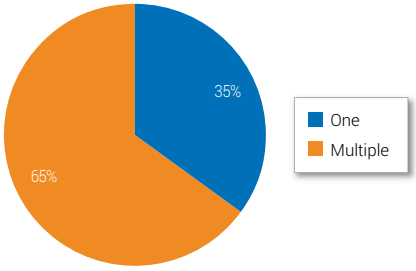
While matrices should not be used as an automatic disqualifier in most cases (with the exception generally being regulated industries), they can be useful tools in ensuring consistent application across a business. For example, if there is a minor crime that you believe is not job related to a specific position, that can be listed as a "pass" or "clear" on a matrix. If there are other crimes that you believe may be job related, however, those could be highlighted as "needs review" and escalated to a centralized source.

Benchmark Insight

Most employers responding to our survey, 65 percent, allow multiple people to conduct individualized assessments within their organization, while 35 percent of respondents restrict the process to one person.

One or More Reviews?

Do you have one or a group of people in your company either in HR or otherwise who conduct individual assessments of job applicants who have had criminal history information revealed during a background screen?



Source: TechValidate survey of 1708 users of First Advantage

3. Create a Centralized Process

While our survey shows most companies have multiple people involved in the individualized assessment process, you may want to consider limiting the people involved to those who "need to know." Doing so will ensure that people with criminal history who are hired are not treated differently or retaliated against and will assist in promoting consistency in how your individualized assessments are conducted. Many employers are creating a centralized review process so that the practice becomes more efficient, generally faster, and promotes consistency throughout your organization.

4. Allow a Candidate to Provide Information

In order to conduct an individualized assessment, you will need to gather information from a candidate so that you can evaluate the individualized assessment factors. The Guidance does not specify how you must gather such information, rather, just that candidates should be given the opportunity to provide information.

Some companies reach out to candidates via telephone to elicit the information. While others allow candidates to provide information at the time they are soliciting criminal history self-disclosure (generally after a conditional offer).

Still others choose to elicit such information during the pre-adverse action stage. The Fair Credit Reporting Act (FCRA) requires that employers wait a "reasonable period" between pre-adverse action and adverse action based in whole or in part on a consumer report. The Federal Trade Commission has opined that 5 business days is a reasonable period of time. The purpose of the waiting period is to give candidates time to provide additional information and/or dispute inaccurate information, if necessary. Some other state and local ordinances require that companies wait a longer period of time (i.e., San Francisco requires 7 days and New York City requires 3 business days from receipt of the pre-adverse action letter).

Take the EEOC lawsuit recently settled by BMW for $1.6 million. The case alleged that BMW excluded African-American workers from employment at a disproportionate rate when the company's new logistics contractor applied BMW's criminal conviction records guidelines to incumbent logistics employees. It resulted in roughly 100 employees being disqualified from employment—80 percent of those workers were African American.

In the consent decree, BMW agreed to allow a candidate 21 days to provide additional information.

You may want to consider expanding the time frame to allow someone to provide information. Our compliance survey revealed that 33 percent of respondents are waiting longer than 5 business days.

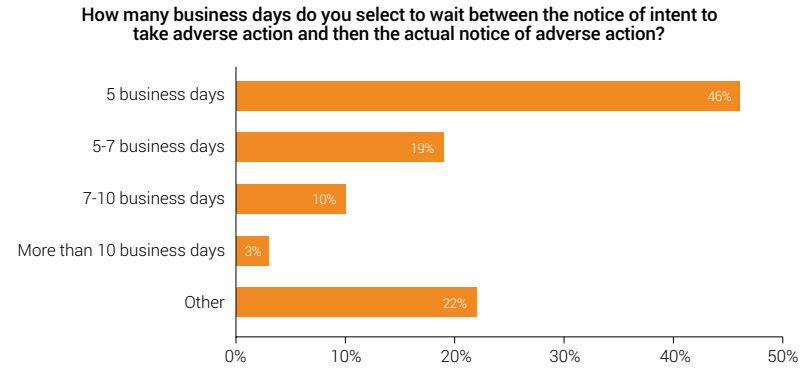
That said, the EEOC has clarified that a company is not required to keep a position open during the dispute process. However, "understanding the intent of the adverse action process is to allow the applicant an opportunity to dispute and keeping the position open enables the intent to be seen through," said Melissa Sorenson of NAPBS.*

*http://www.shrm.org/hrdisciplines/safetysecurity/arciles/pages/background-screens-criminal-records.aspx

Benchmark Insight

While 46 percent of employers participating in our survey observe the standard five-day adverse action wait period, a large number of employers—33 percent—are expanding that wait to longer than five days.

Average Adverse Action Waiting Period



Source: TechValidate survey of 1700 users of First Advantage

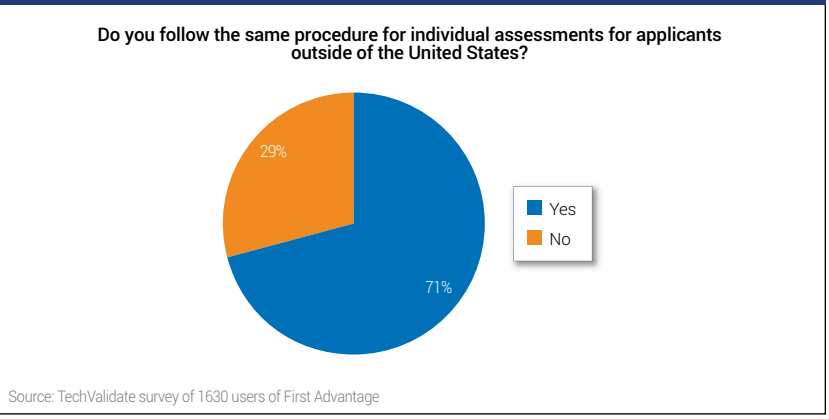
5. Consider Worldwide Consistency

Although individualized assessments are arguably only required in the United States, consistency creates clarity. To give candidates and employees—both domestic and international—equal opportunity, it's recommended that employers extend the individualized assessment process worldwide. In fact, in our compliance survey, an overwhelming majority of employers surveyed, 71 percent, already incorporate individualized assessments as part of their global hiring initiatives.

Benchmark Insight

Yes—71 percent of employers report that they include individualized assessments as part of their international hiring process. If you not doing it, now might be a good time to start.

Individual Assessments Worldwide



Source: TechValidate survey of 1630 users of First Advantage

6. Train, Train, Train!

Once you have a policy in place for performing individualized assessments, diligently train your staff. Document the training and then periodically audit behavior to ensure compliance

Arrest Records

Under the FCRA, a consumer reporting agency (CRA), which includes background screening companies, generally may not report records of arrest that did not result in a conviction where the arrests occurred more than seven years ago. However, under the federal law CRAs may report convictions indefinitely. (Some states have greater restrictions). In our experience, seven years is the average timeframe MOST customers select to review.

Sample Individualized Assessment Form

Use a consistent form similar to the one below to guide your individual assessment process and retain all documentation as proof of completion.

Individualized Assessment Form

Information to Consider and Document
About the Candidate
• Candidate name:
• Date company received criminal record notification:
• What was the criminal record returned?
• Did the Candidate self-disclose the conviction?
FCRA Compliance
• Date pre-adverse action notice sent:
• Date adverse action notice sent:
Proof of Contact
• Date(s) the candidate was contacted and by what means:
• NOTE: Proof of candidate contact receipt needed (registered letter, email read receipt)—Attach proof
• Did the candidate respond?
About the Individualized Assessment
• Additional facts or circumstances surrounding the offense? Common considerations: What was the nature and gravity of the offense? Anything else for this job position?
• Age at the time of the offense or time of release. Common considerations: Recidivism rates decline as age increases
• Did the candidate perform the same type of work post-conviction with no known incidents of criminal conduct? Common considerations: If yes, consider hiring.
• Did the candidate do similar work before or after the offense as the job for which they are applying? Common considerations: What is the nature of the job they are seeking now? Anything else for this job position?
• What rehabilitation efforts have been made (school, counseling, courses) Common considerations: Anything else for this job position?
• Can the candidate provide an employment or character references regarding fitness for position? Common considerations: If yes, contact the references to and ask for examples of job duties similar to position being sought . . . anything else?
Conclusion
• Does the additional information obtained during the individualized assessment mitigate the risk for this job position?
• Was the individual hired?

$33.5 million. The amount collected by the EEOC in 2015 remedies.

Avoiding Common Errors that Get Employers in Trouble

The EEOC states it will challenge "systemic discrimination," or patterns or practices that have a broad impact on a group of employees or job applicants. In 2015, it resolved 268 investigations, obtaining $33.5 million in remedies.

The Commission also set forth a goal to ensure that 20 percent of its annual litigation docket in 2015 was "systemic," and 22 percent to 24 percent of its docket in 2016 was systemic.

In the last few years, the EEOC has targeted companies for the following acts relating to use of criminal history:

- Bright line policies/rules ("we don't hire felons")
- Application of a client's bright line policies (ie: staffing companies)
- Failure to conduct individualized assessments
- Failure to consider length of employment in an acquisition situation
- Failure to allow a candidate the opportunity to provide information about his or her conviction

NOTE: The Commission will assess relevant evidence when making a determination of disparate impact, including applicant flow information maintained pursuant to the Uniform Guidelines on Employee Selection Procedures.

2-4% Increase

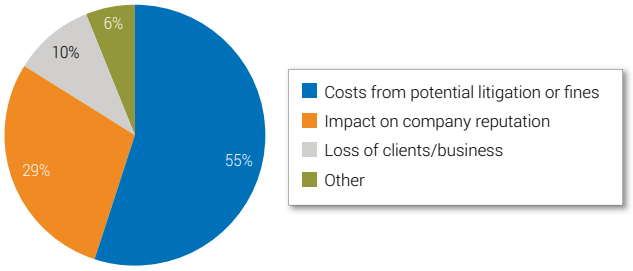
in annual systemic litigation cases— it's a 2016 goal for the EEOC.

Benchmark Insight

Financial costs ranked as the highest risk of non-compliance by our survey respondents, followed by reputational damage. Both consequences are very real risks.

Non-Compliance Risk

What do you feel is the biggest risk to your organization if you did not or do not maintain compliance?



Source: TechValidate survey of 2062 users of First Advantage

Summary

The legislative landscape pertaining to hiring and employment screening is quickly shifting with city, state and federal updates. Likewise, so is enforcement of those laws and regulatory guidelines, as evidenced by the EEOC increasing its focus on the use of criminal history in the past few years.

To mitigate the risk of EEOC non-compliance, employers should create and follow a comprehensive individualized assessment process anytime a criminal history is revealed either by a candidate or as part of a background check. Integrating this extra step in the hiring process can protect against costly financial fines, penalties and judgments, while also helping employers build a more inclusive, candidate-friendly hiring process.

Act now. Create a policy for performing individualized assessments, and implement a consistent plan. Document what you accomplish and you will be prepared.

Definitions

Bright Line Rule or Decisions	Blanket statement that will get you in trouble: No criminals under any circumstances. The purpose of a bright-line rule is to produce a consistent application of the hiring process. This is no longer acceptable to the EEOC.
Disparate Impact	Employment practice that has an unjustified adverse impact onmembers of a protected class
EEOC	Equal Employment Opportunity Commission
Four-Fifths Rule	The four-fifths is described as "a selection rate for any race, sex, or ethnic group which is less than four-fifths (or 80%) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact."
Green Factors	Components identified by the Eighth Circuit in the 1975 Green v. Missouri Pacific Railroad relevant to assessing criminal record exclusion job-relatedness. The three factors are: • The nature and gravity of the offense. • The time that has passed since the offence and/or completion of the sentence. • The nature of the job held or sought.
Systemic Discrimination	Patterns or practices that have a broad impact on a group of employees or job applicants.
Uniform Guidelines	The written EEOC guidelines designed to aid in the achievement of the United States' goal of equal employment opportunity without discrimination on the grounds of race, color, sex, religion or national origin.