

# Legal Overview of How to Make Hiring and Promoting More Equitable

By Allen Smith, J.D.

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**E**mployers eager to make hiring and promoting fairer for people of color should review Equal Employment Opportunity Commission (EEOC) initiatives and consent decrees for guidance.

"The EEOC has focused on hiring practices and hiring barriers as ... priorities, particularly because these cases are difficult to prove," and employees' attorneys are unwilling to take them on, said Barry Hartstein, an attorney with Littler in Chicago.

## EEOC Guidance on Criminal History

"In dealing with concerns of race discrimination, one of the best examples was the EEOC's adoption of guidance in April 2012 dealing with criminal history," he noted. "The EEOC has viewed hiring barriers based on criminal history as having the most significant adverse impact on African-Americans, and these findings were instrumental in the EEOC adopting the Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>)."

The guidance noted that arrest and incarceration rates are particularly high for Black and Hispanic men. Black and Hispanic individuals are arrested at a rate that is two to three times their proportion of the general population, the EEOC noted.

In its guidance, the agency restricted the use of criminal history in the hiring process, taking the view that blanket exclusions based on criminal history have an adverse impact based on race and national origin, and particularly on Black Americans. Based on the disparate impact created by such exclusions, an employer must demonstrate that the disparate impact was related to the job and consistent with business necessity to justify it.

The EEOC created a three-prong standard of considering:

- The nature of the crime.
- The time elapsed since the conviction or release from incarceration.
- The nature of the job.

In addition, employers had to make an individualized assessment prior to excluding Black applicants from job consideration.

"This also led to many state and local 'ban the box' and related restrictions on the use of criminal history in the hiring process," Hartstein said.

The Society for Human Resource Management has urged organizations not to view a criminal record as an automatic disqualification from employment ([www.shrm.org/about-shrm/news-about-shrm/pages/shrm-urges-employers-to-consider-applicants-with-criminal-histories.aspx](http://www.shrm.org/about-shrm/news-about-shrm/pages/shrm-urges-employers-to-consider-applicants-with-criminal-histories.aspx)).

## SHRM RESOURCE SPOTLIGHT

Overcoming Workplace Bias ([www.shrm.org/ResourcesAndTools/Pages/overcoming-workplace-bias.aspx](http://www.shrm.org/ResourcesAndTools/Pages/overcoming-workplace-bias.aspx))

### EEOC Consent Decree Offers Outreach Ideas

Hartstein noted that an EEOC consent decree involving settlement of a failure-to-hire claim referenced potential minority outreach and hiring efforts, such as:

- Reaching out to colleges, universities, community colleges and technical schools with a significant minority population to post job openings for applicable positions.
- Participating in job fairs held at communities with large populations of color within an appropriate geographic area.
- Posting job openings in publications historically popular among Black, Hispanic and immigrant communities.
- Posting job openings in publications that circulate in Spanish and websites directed toward the Hispanic community.
- Developing a diversity, equity and inclusion section on an employer's website, discussing job opportunities and inclusion efforts.
- Engaging in good-faith outreach activities to recruit and hire qualified nonwhite applicants, consistent with their availability in the workforce.
- Making a good-faith effort to achieve parity in the hiring rates of qualified white and qualified nonwhite applicants for available positions.

"Creating visibility in the minority community through community involvement, internship programs and scholarships also may be critical in strengthening the brand and helping create an environment to attract well-qualified minority candidates," Hartstein said.

"It is imperative to foster a respectful and fair environment," said Myrna Maysonet, an attorney and chief diversity officer with Greenspoon Marder in Orlando, Fla., who cautioned against implicit bias ([www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/try-these-strategies-to-reduce-implicit-bias-in-your-workplace.aspx](http://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/try-these-strategies-to-reduce-implicit-bias-in-your-workplace.aspx)).

*[SHRM members-only HR Q&A: Implicit Bias Resource Guide ([www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/resources-articles-workplace-bias.aspx](http://www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/resources-articles-workplace-bias.aspx))]*

### Making Promotions Fairer

"Getting hired is just the first of many hurdles for a minority employee," said Katie Meyer, an attorney with GKG Law in Washington, D.C. When people of color are hired, "these individuals are commonly not promoted as frequently as white employees."

Many employees' qualifications are prejudged by the educational institution they attended, said Risha Grant, founder and CEO of Risha Grant LLC, a diversity consulting and communications firm in Tulsa, Okla. She said that employers should not assume that employees who attended traditionally white educational institutions merit promotion more than employees who went to historically black colleges or universities.

Meyer said that, "Companies need to take an interest in the advancement of employees of color. This includes creating comprehensive mentoring and training programs that do more than just help the employee create good work product."

Mentors should advocate for and promote the employee's accomplishments, assist employees of color in navigating and understanding the workplace culture, and create contacts and relationships within the industry, she added.

Moreover, any employment action, including hiring and promoting, should be reviewed to determine if the action has an adverse impact on a minority group, Meyer recommended.

"The EEOC defines adverse impact as 'a substantially different rate of selection in hiring, promotion or other employment decision, which works to the disadvantage of members of a race, sex or ethnic group,' " she said. Meyer noted that adverse impact is typically found when a minority group's selection rate is less than 80 percent of the selection rate for the group with the highest selection rate.

### Going One Step Further

If an organization is finding barriers in its processes, either analytically or anecdotally, or both, employers should be evaluating their decision-making methods, said David Cohen, president of DCI Consulting, and Joanna Colosimo, SHRM-SCP, director of compliance and work analytics and principal consultant for the consulting firm in Washington, D.C.

"Having EEO policies confirming that the company is an equal opportunity employer and does not discriminate on the basis of race and other characteristics is not always enough," said Jimmy Robinson, an attorney with Ogletree Deakins in Richmond, Va., and co-chair of the firm's diversity and inclusion practice group. "Going one step further by stating that the company values diversity and inclusion may help it to attract and retain diverse talent."

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