



# CITY OF IOWA CITY MEMORANDUM

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Date: October 4, 2018  
To: Iowa City Business Owners  
From: Kristin Watson, Human Rights Investigator  
Re: Criminal Background Checks in Hiring

The United States incarcerates more of its population than any other country in the world.<sup>1</sup> Over 60 percent of formerly-incarcerated people are unemployed one year after their release.<sup>2</sup> Former inmates who do find employment are paid over 40 percent less over their working lives than people who have not been incarcerated.<sup>3</sup> Incarceration has a disproportionate impact on communities of color. Black men are over five times more likely, and Hispanic men are almost three times more likely, to have been incarcerated than white men.<sup>4</sup> Similarly, Black women are 5.5 times more likely, and Hispanic women over two times more likely, to have been incarcerated than white women.<sup>5</sup> While “person with a criminal history” is not a protected class per se, refusing to hire people who have such histories without individual consideration of their circumstances may lead to successful complaints of discrimination.

## **What is a criminal history?**

It can be more complicated than it appears to determine whether a person actually has a criminal history. Arrests should never be used to disqualify an applicant from consideration. An arrest has no bearing on whether the person is eventually found guilty of the act for which they were arrested. Reports from private database companies should be examined carefully to determine whether convictions listed are truly convictions; that is, employers should be sure they have not been expunged, sealed, or subject to a diversion program.

## **In what ways can using criminal histories be discriminatory?**

There are two ways in which using criminal records can be discriminatory. First, an employer can treat this information differently for different applicants. This is called disparate treatment. For example, a white and a Black applicant were both convicted of possessing marijuana in high school. Both are now college graduates and neither has had any subsequent contact with the justice system. A potential employer who treated one applicant's conviction as a youthful indiscretion, referring him for an interview, and the other's as evidence of an underlying criminal nature, rejecting him from consideration, would be open to a complaint of disparate treatment.

Second, an employer's seemingly neutral policy or practice may disproportionately screen out members of protected groups (without a job-related need or business necessity for the policy). This is called disparate impact. If such a policy has the effect of screening out many more people of color from consideration than white people, an employer may be open to

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<sup>1</sup> [https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm\\_term=.a2381579bace](https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.a2381579bace)

<sup>2</sup> Society for Human Resource Management, “Background Checking—The Use of Criminal Background Checks in Hiring Decisions” (2012), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminalbackgroundcheck.aspx>

<sup>3</sup> Bruce Western and Becky Pettit, “Collateral Costs: Incarceration's Effect on Economic Mobility,” [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs\\_assets/2010/collateralcosts1pdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf)

<sup>4</sup> <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/>

<sup>5</sup> <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/>

claims of disparate impact discrimination. For example, a policy that denies employment to any person with a felony conviction, no matter how old the conviction is, or for what crime, will operate to disproportionately reject applicants of color, due to historic patterns of discrimination in policing.

### **What are best practices for using criminal histories?**

Adapted from the Equal Employment Opportunity Commission's [Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964](#):

- Do not use policies that exclude people from employment based upon having *any* criminal record.
- Thoroughly train anyone who will advertise positions, interview, or make hiring decisions.
- Develop a narrowly-tailored written policy for screening applicants for criminal conduct.
  - Identify the essential requirements of the job and the circumstances under which the job is performed.
  - Determine the specific offenses that may demonstrate a person is unfit for doing the job, based on rational analysis of all available evidence (not assumptions, stereotypes, or fears about the “type” of person who might commit that offense).
  - Determine the duration of exclusion for such offenses. For example, is a conviction from 10 years ago relevant if there are no law enforcement contacts since? The answer will depend upon the job and the crime.
  - Include an opportunity for an individualized assessment. Inflexible policies leave no room for assessing the aggregate of factors that comprise a person’s history.
  - Record the justification for the policy and procedures; keep a record of any consultations and research considered in crafting them.
- When asking about applicants’ criminal records, limit question to records for which exclusion would be job-related for the position and consistent with business necessity.
- Keep information about criminal records confidential. Use it only for the purpose intended and share only with those who absolutely need to know it.
- Do background checks and request criminal history information only of applicants to whom you intend to offer the job. Do not request it of all applicants or use it as a general screening device.

The full text of the EEOC’s Guidance on this subject can be found at [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).<sup>6</sup>

The City of Iowa City Office of Equity and Human Rights has been providing memos to businesses on areas of discrimination since August of 2016. Please send topics you would like to receive guidance on in the future, or inquiries regarding discrimination issues, to [humanrights@iowa-city.org](mailto:humanrights@iowa-city.org).

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<sup>6</sup> In March of 2018, a Texas US District Court Judge ruled that the EEOC’s Guidance was not legally enforceable within the state of Texas, due to a procedural error in its issuance. However, the judge also declined to declare, as the State of Texas had requested, that the state has a right to bar all convicted felons from working for state agencies. Instead, the court stated that there were many conceivable scenarios where qualified applicants with felony convictions would “pose no objectively reasonable risk” and did not enjoin the EEOC from issuing right-to-sue letters based upon claims of denial of employment opportunities due to criminal history. Texas v. EEOC, 5:13-CV-255-C 2, 2018 U.S. Dist. LEXIS 30558.