



Texas Association of School Boards

Legal Services

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Frequently Asked Questions about EEOC Guidance on Consideration of Criminal History

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Texas law precludes school district employment for persons with certain criminal history. The federal Equal Employment Opportunity Commission (EEOC) cautions against precluding employment based on criminal history without an individual assessment of each applicant and position sought. The following FAQs analyze this guidance as it relates to school district employees.

Q. What type of criminal history will make a person ineligible to work at a school district?

- A. The law prohibits a person from working at a school district if the person has been convicted of certain offenses, described below (mandatory restrictions). SBEC may sanction an educator who does not discharge an employee if the educator knows or should have known, through a criminal history review, that the employee has been convicted of one of these offenses. Tex. Educ. Code § 22.085(e).

In addition, districts may adopt and enforce local eligibility standards. It is purely a local decision whether to hire a person who has a criminal history but who has not been convicted of one of the offenses listed in statute.

Whether applying state or local eligibility standards, districts should be mindful of the EEOC's guidance on use of criminal history information. This guidance is addressed below.

Q. What are the mandatory restrictions on school district employment?

- A. State law requires a district to refuse to hire or to terminate a person, as applicable, if the person was:
- convicted of or placed on deferred adjudication community supervisions for an offense requiring registration as a sex offender; or
 - convicted of a felony under Texas Penal Code Title 5 (crimes against the person) if the victim was under eighteen at the time of the offense; or

Tex. Educ. Code § 22.085(a).

The district may make an exception if:

- the offense is more than 30 years old, and
- the person has satisfied the terms of the court order entered on conviction.

Tex. Educ. Code § 22.085(b).

Q. *What employment laws are implicated when considering arrest and conviction records for employment decisions?*

A. Criminal background checks implicate the employment discrimination laws. In April 2012, the Equal Employment Opportunity Commission (EEOC) issued updated guidance regarding the role of arrest and conviction records in employment decisions. EEOC, [Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964](#), Apr. 25, 2012. While the Fifth Circuit Court of Appeals enjoined the enforcement of the EEOC guidance¹, employers should note the following aspects of the guidance as related to hiring in Texas school districts.

- **Disparate impact on racial minorities**: The Guidance states that consideration of arrest and conviction records has a disparate impact on minorities, meaning that reliance on criminal history records will screen out more minorities than non-minorities. A disparate impact is not *per se* illegal, but it creates a burden for the employer to demonstrate that the practice is job-related and consistent with business necessity.
- **An arrest does not establish criminal conduct**: The Guidance states that an employment decision based solely on the fact that a person was arrested, without more, is not job related and consistent with business necessity. An employer must point to other factors that support the decision.
- **State law is not a defense**: The Guidance asserts that a state law mandating an employment action based on a specific criminal history record is not a defense to a claim of discrimination. The employer must identify a different basis for business necessity.

Each of these three aspects is discussed in more detail below.

Q. *How can a district demonstrate that consideration of criminal history records is job-related and consistent with business necessity?*

A. The EEOC has identified two methods for demonstrating business necessity with respect to criminal background checks: validation or targeted screening.

¹ *Texas v. Equal Employment Opportunity Comm'n*, 2019 WL 3559629 (5th Cir. 2019) (enjoining the EEOC from enforcing guidance on criminal records).

Validation is a technical term that refers to statistical analysis of criminal history reviews against job performance. Validation must comply with the EEOC's rules on employee selection procedures. 29 C.F.R. Part 1607.5. As the EEOC explains in the Guidance, formal validation relating to recidivism rates and workplace ramifications will be difficult because of a lack of social science studies.

Targeted screening is the more viable option for school districts. Targeted screening consists of two steps:

- Considering the nature of the crime, the time elapsed since the offense, and the nature of the job (the *Green* factors, discussed in more detail below).
- Providing an opportunity for an *individualized assessment* to determine if application of the screening criteria to a particular individual is job-related and consistent with business necessity.

Individualized assessment generally involves the following steps:

- Notice to the individual that he has been screened out because of a criminal conviction;
- An opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and
- Consideration of whether any additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job-related and consistent with business necessity.

Additional relevant information may include: information showing that the criminal record is not accurate (e.g., mistaken identity); the number of offenses of which the individual was convicted; older age at the time of conviction or release from prison²; subsequent work history; rehabilitation efforts (e.g., education/training); employment or character references; and whether the individual is bonded.

The guidance also suggests that the employer consider “the facts or circumstances surrounding the offense or conduct.” Districts should exercise caution in relying on additional information provided by the individual regarding the facts or circumstances surrounding an offense because it is difficult to establish the reliability of the information. A district may wish to obtain court records when addressing this factor.

If the individual does not respond to an employer's request for information, the employer may proceed to make an employment decision.

² The EEOC cites to data indicating that recidivism rates decline with age. See Guidance, fn 122.

Q. Can a district exclude a person based on criminal conduct not listed at Texas Education Code section 22.085(a)?

- A. Yes, provided the district can justify the exclusion based on nondiscriminatory factors. The standard for disqualification in the Texas Education Code is a minimum standard. A district may wish to exclude individuals based on criminal offenses not listed in the Texas Education Code, such as property crimes (e.g., theft, fraud), violent crimes against adult victims (e.g., assault, murder), drug and alcohol offenses (e.g., driving while intoxicated, possession of a controlled substance), or public decency offenses (e.g., weapons possession, gambling, bribery).

The Guidance recommends that employers apply the *Green* factors in deciding whether to exclude an individual based on criminal conduct. The *Green* factors were identified in *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975) (finding policy discriminatory that disqualified any applicant with conviction for any crime other than minor traffic offense).

The *Green* factors are:

- Nature and gravity (seriousness) of the offense: The nature of the harm (e.g., property crime or violent crime).
- Time elapsed since the offense and/or completion of the sentence: Whether the risk of recidivism has declined to the same level as for a non-offender.
- Nature of the job held or sought: What, if any, connection exists between the criminal conduct and the essential functions of the position in question.

To ensure consistency and objectivity in decision-making, TASB Legal Services recommends that districts adopt written local standards. In adopting standards, districts may wish to consider some or all of the following factors, which are based on those considered by state licensing agencies:

- Whether the crime is a felony or misdemeanor;
- The degree of offense (e.g., first, second, or third degree felony);
- The nature of the crime (e.g., assault, property crime, fraud, drug offense);
- The relationship between the crime and the proposed job duties;
- The extent and nature of the person's past criminal activity;
- The age of the person when the crime was committed;
- The amount of time that has elapsed since the person's last criminal activity; and
- The conduct and work activity of the person before and after the criminal activity.

Tex. Occ. Code §§ 53.022, .025.

Q. When may a district base an employment decision on conduct leading to an arrest?

- A. A district may base an employment decision on conduct leading to an arrest when the employer had independent evidence of the criminal conduct. The guidance states that the fact of an arrest does not establish that criminal conduct occurred. Simply put, arrests are not proof of criminal conduct. Therefore, an exclusion based on an arrest, without more, is not job-related and consistent with business necessity.

An arrest may, however, be the basis for a factual inquiry into whether the conduct underlying the arrest justifies an adverse action. The guidance provides an example of an assistant principal who is arrested and charged with inappropriately touching female students:

[The school] has a policy that requires suspension or termination of any employee who [sic] the school believes engaged in conduct that impacts the health or safety of the students. After learning of the accusations, the school immediately places [the principal] on unpaid administrative leave pending an investigation. In the course of the investigation, the school provides [the principal] a chance to explain the events and circumstances that led to his arrest. . . . The school also talks with the girls, The school does not find [the principal's] explanation credible. Based on [the principal's] conduct, the school terminates his employment pursuant to its policy.

. . . [T]he EEOC concludes that no discrimination occurred. The school's policy is linked to conduct that is relevant to the particular jobs at issue, and the exclusion is made based on descriptions of the underlying conduct, not the fact of the arrest.

Thus, a district may terminate an employee who has been arrested if the district has independent reason for believing that the underlying conduct occurred. Even though the arrest may be the impetus for the investigation, the conduct, not the arrest, is the basis for the decision. The district need not find that the employee engaged in the conduct "beyond a reasonable doubt." Rather, it is sufficient if the district forms a reasonable belief that the conduct occurred. The "reasonable doubt" standard applies to criminal proceedings, not to employment matters.

The guidance also addresses convictions. In most cases, a record of a conviction is sufficient evidence that the person engaged in the underlying conduct. Reasons may nonetheless exist for concluding that a record of conviction is not reliable. The Guidance recommends that employers not ask about convictions on job applications. If and when inquiries into conviction records are made, the inquiries should be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.

Q. Does the EEOC's guidance prevent a district from terminating an employee who has been convicted of one of the offenses listed in Texas Education Code section 22.085(a)?

- A. Probably not. In most cases, if not all, the exclusions listed in Section 22.085(a) are job-related and consistent with business necessity, regardless of their incorporation into state law. Title VII preempts state and local laws that require or permit discriminatory practices. Therefore, the EEOC will not defer to criminal-history based exclusions in state law. In other words, an employer may not rely on a state law requirement as a defense to a discriminatory practice that is not job-related and consistent with business necessity.

This principle is of particular concern to Texas school districts because Section 22.085(e) requires districts not to hire, or to terminate, a person who has been convicted of a Title 5 felony if the victim was under eighteen at the time of the offense or convicted or placed on deferred adjudication community supervision for an offense requiring registration as a sex offender. A district cannot rely on the existence of state law to argue that its actions were job-related and consistent with business necessity.

Although the state law requirement is not a defense, a district may still refuse to hire, or terminate, a person based on Section 22.085(a) if the district can demonstrate that its decision was job-related and consistent with business necessity. The Guidance provides the following example of a state law exclusion in a school setting that is job-related and consistent with business necessity:

Elijah, who is African-American, applies for a position as an office assistant at Pre-School, which is in a state that imposes criminal record restrictions on employees. Pre-School . . . uses all of its employees to help with the children. Pre-School performs a background check and learns that Elijah pled guilty to charges of indecent exposure two years ago. After being rejected for the position because of his conviction, Elijah files a Title VII disparate impact charge based on race to challenge Pre-School's policy. The EEOC . . . finds that the policy has a disparate impact and that the exclusion is job-related for the position in question and consistent with business necessity because it addresses serious safety risks of employment in a position involving regular contact with children.

This example indicates that the EEOC will defer to exclusions designed to protect school children. However, the EEOC's emphasis on contact with the children suggests that a district would have to demonstrate contact with children in order to justify a decision not to hire, or to terminate, based on an offense listed in Section 22.085(a). In most districts, all or virtually all employees have regular contact with children. Nonetheless, a district should review the *Green* factors discussed above before taking action under Section 22.085(e).

Q. What is the difference between conviction and deferred adjudication?

- A. *Conviction* is a formal judgment of guilt in a criminal case. A person may be convicted of a crime because a judge or jury found him or her guilty, or because the person pled guilty or no contest (*nolo contendere*) to criminal charges. A person who has been convicted of a crime may be sentenced to prison or may be placed on community supervision (probation).

Deferred adjudication community supervision is when the court imposes certain conditions on an offender for a specified period during which criminal proceedings are deferred without an adjudication of guilt. Tex. Code. Crim. Pro. art. 42A.101. If the offender successfully completes community supervision, the judge will dismiss the criminal charges. Tex. Code. Crim. Pro. art. 42A.111.

Q. Is the EEOC guidance enforceable by law?

- A. The enforceability of the EEOC guidance was challenged by Texas Attorney General Ken Paxton in 2013. In *Texas v. EEOC*, the state asked the district court to prevent the EEOC from applying the guidance. The Fifth Circuit Court of Appeals found that Texas had standing to sue and sent the case back to the district court. *Texas v. Equal Employment Opportunity Comm'n*, 827 F.3d 372 (5th Cir. 2016), reh'g en banc granted, opinion withdrawn, 838 F.3d 511 (5th Cir. 2016). On remand, the district court for the Northern District of Texas, Lubbock Division, declined to allow Texas the right to maintain a categorical ban on hiring applicants with felonies and refused to enjoin the EEOC from issuing right-to-sue letters based on employment decisions made because of an applicant's criminal history. However, the court enjoined the EEOC from enforcing the guidance against Texas until the EEOC complied with the notice and comment requirements of the Administrative Procedures Act. *Texas v. Equal Employment Opportunity Comm'n*, No. 5:13-CV-255-C (N.D. Tex. Feb 1, 2018). In August of 2019, the Fifth Circuit Court of Appeals affirmed the injunction, modifying it to clarify that the EEOC may not treat the guidance as binding in any respect. *Texas v. Equal Employment Opportunity Comm'n*, 2019 WL 3559629 (5th Cir. 2019).

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Personnel/documents/eec-guidance-consideration-crim-history.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoollawesource.tasb.org.

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