

**Enforcing the Title VII Standards that
Relate to People with Criminal Records**



EEOC Investigators and Mediators Training

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Overview

- Impact of criminal justice system on communities of color
- Proliferation of background checks
- EEOC guidances regulating conviction and arrest records

The Hard Facts

- More than 700,000 people are released from U.S. prisons every year; four times more than 25 years ago.
- Nearly two-thirds released from prison served time for non-violent offenses, including drug offenses (37%) and property offenses (25%).

People of Color are Disproportionately Impacted by the Criminal Justice System

- The war on drugs contributes to the over-representation of people of color in the criminal justice system.
- African Americans are not only more likely to be arrested than whites, but are also more likely to be charged once arrested, and are more likely to be convicted and incarcerated when charged.
- 2 out of 3 non-violent offenders released from prison each year are people of color (48% African-American, 25% Latino).

African Americans are Incarcerated at a Rate Six Times that of Whites

All Men and Women (ages 18 and over)

All.....	1 in 102
White.....	1 in 245
Latino.....	1 in 96
African American.....	1 in 41

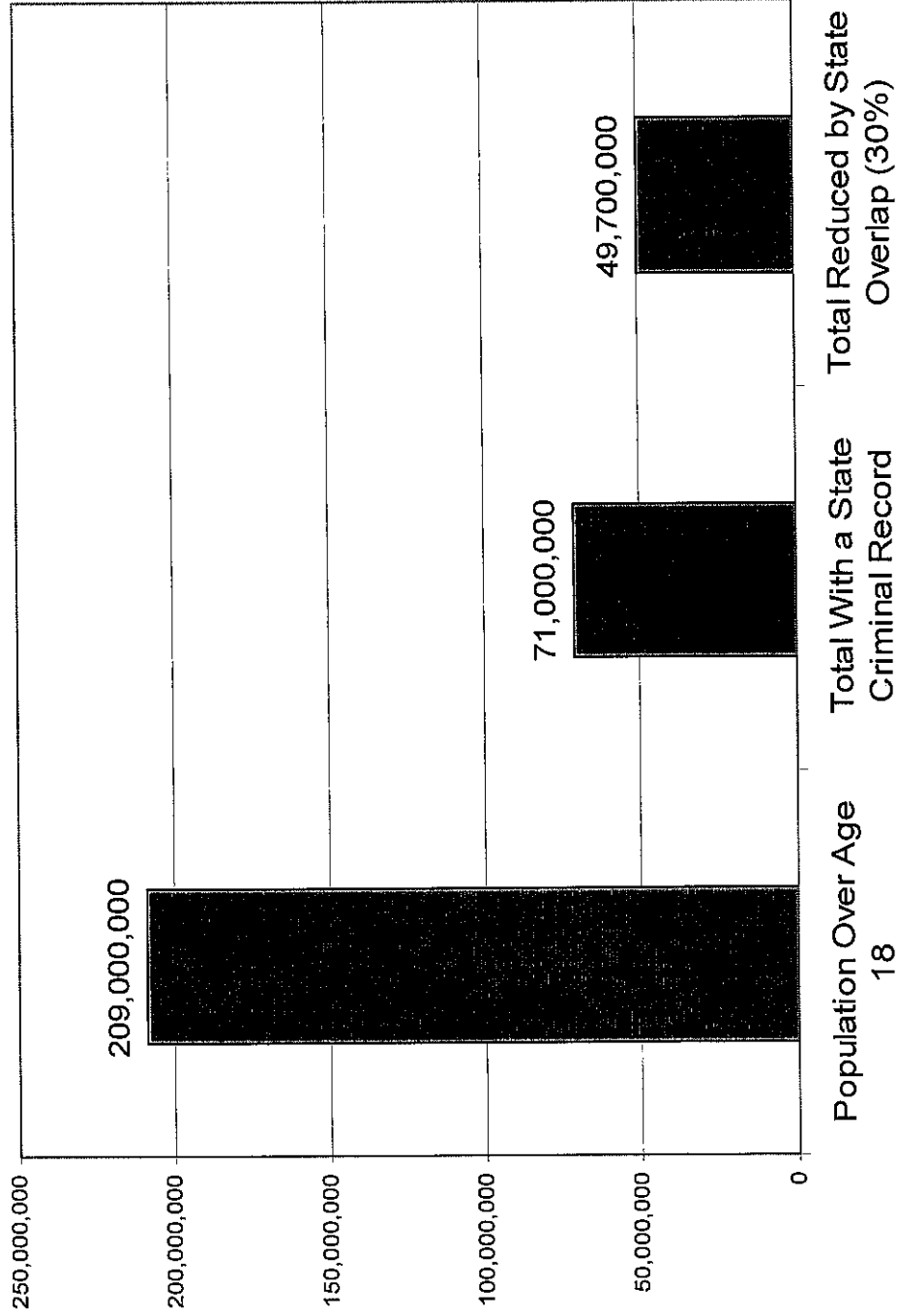
Men (ages 18 and over)

All.....	1 in 54
White.....	1 in 106
Latino.....	1 in 36
African American.....	1 in 15
African American (Men ages 20 – 34)..	1 in 9

(Pew Center on the States, "One in 100: Behind Bars in America 2008")

One In Five U.S. Adults Possess A Criminal Record on File with the States

(Bureau of Justice Statistics, 2006; U.S. Census 2000)



More People with Criminal Records, Combined with Increased Records Checks

- In 2004, 80% of large employers conducted criminal background checks (up 29% since 1996).
- In 2002, for the first time, the FBI conducted more fingerprint-based background checks for civil purposes than for criminal investigations (5 million for employment purposes). In 2006, the FBI processed over 9 million fingerprint-based background checks for employment purposes.
- A major survey of Los Angeles employers found that over 60% of employers would “probably not” or “definitely not” be willing to hire an individual with a criminal record.

Criminal Background Checks are Big Business

- A national task force found that there are "hundreds, perhaps even thousands" of regional and local companies that generate criminal background checks for employers at a cost of just \$20 to \$50.
- The largest firms, including ChoicePoint and LexisNexis, maintain criminal records on 90 to 160 million individuals and each generate millions of criminal background checks totaling billions of dollars in revenue.
- Criminal background checks are available instantly online, with just a name and a date of birth, from major screening firms including "Rapsheets.com" and "InstantCriminalChecks.com."
- Private screening firms and the employers who use them routinely violate federal and state consumer protection laws that require notification about the screening and consent of the worker, a copy of the report before an adverse action is taken, and an opportunity to correct inaccurate information.

InstantCriminalChecks.com

[Home](#) |
 [Order](#) |
 [Order Lookup](#) |
 [Sample Record](#) |
 [Search \(CC\)](#) |
 [Employee Check](#) |
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InstantCriminalChecks.com Order Form

Person You Are Investigating:

*=Required Information

*First Name: Middle Initial: *Last Name: Suffix (if any): (jr, sr, III)

Social Security Number: - - *Date of Birth: [Month] [Day] [Year]

Please Select Statewide, 3-State or National Criminal Check:

Statewide Criminal Check \$24.95

California multi-county (CA)

view state descriptions

- Add 2 additional states for only \$20 -

3-State Criminal Check \$44.95

2nd -Select 2nd State \$20-

3rd -Select 3rd State FREE-

National Criminal Check \$59.95

National Criminal Check

view national description

46 state national search plus Washington DC:

- AL, AK, AZ, AR, CA, CO, CT, DC, FL, GA, HI, ID, IL, IN, IA,
- KS, KY, LA, ME, MD, MI, MN, MS, MO, MT, NE, NV, NH,
- NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX,
- UT, VA, VT, WA, WI, WV

All orders include a free national sex offender search, terrorist background report & most wanted check.

Contact Information:

*E-Mail Address:

Phone Number:

Credit Card Information:

*Name:

Enter name exactly as appears on your card

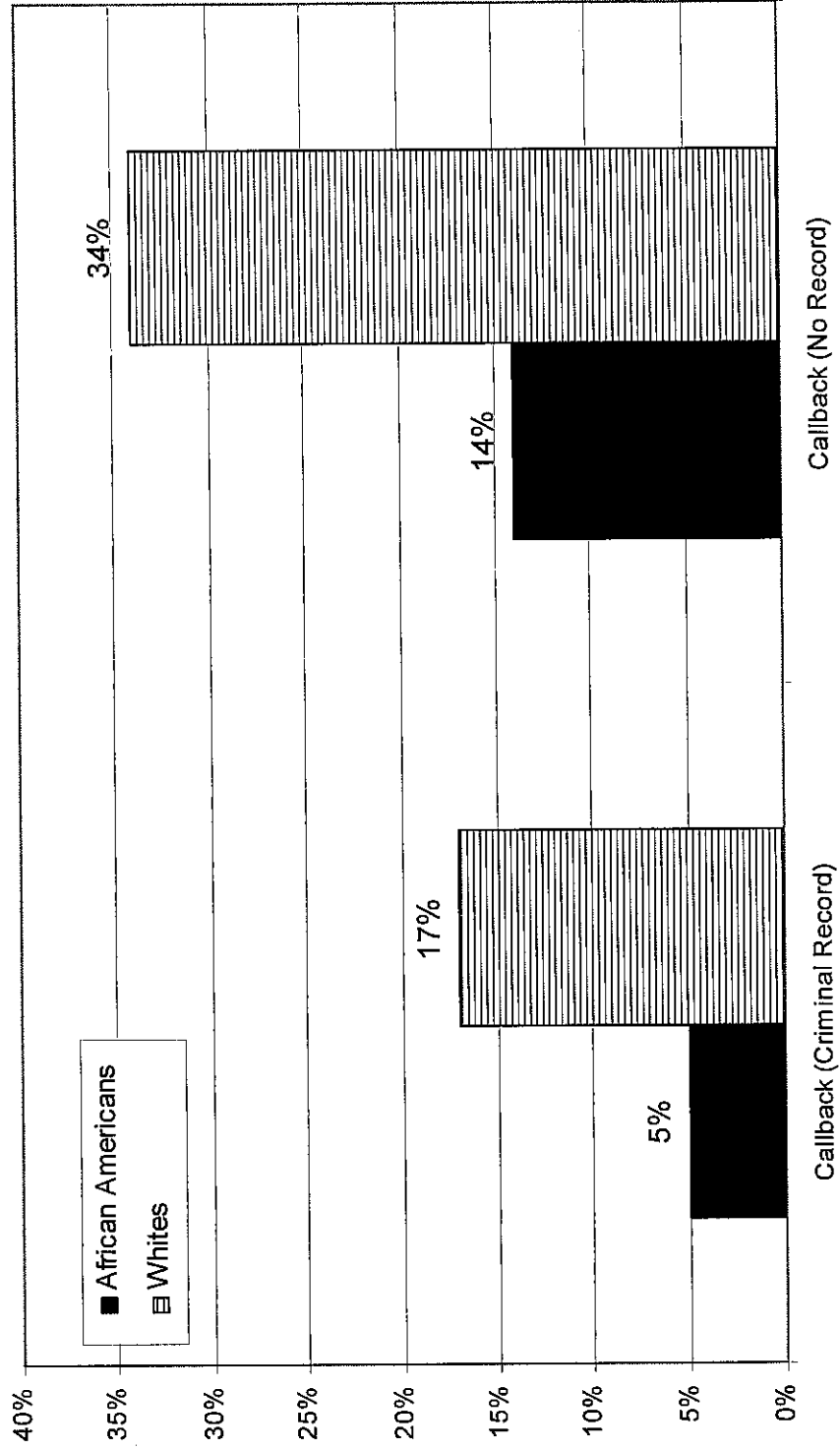
*Type of Card: [Select One]

*Card Number:



Employment Testing Survey Documents Impact of a Criminal Record on Interview Callbacks, by Race

(Devah Pager, "The Mark of a Criminal Record," *American Journal of Sociology* (March 2003).)



The EEOC's Criminal Records Policies: The Basics

- **“Disparate impact” presumed:** The Commission has recognized that “an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on [African American and Latino workers] in light of statistics showing that they are convicted at a disproportionately higher rate than their representation in the population.” (EEOC Policy Statement on the Issue of Conviction Records (issued 2/4/87))
- **“Business necessity” required:** Routine violations of Title VII are established by employer hiring practices that reject workers with an arrest record or any conviction, in the absence of a justifying business necessity.

EEOC Guidances on Criminal Records

- EEOC Policy Guidance on the Consideration of Arrest Records in Employment Decisions (issued 9/7/90)
 - EEOC Policy Statement on the Issue of Conviction Records (issued 2/4/87)
 - EEOC Policy Statement of the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (issued 7/29/87)
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- The guidances are available on the EEOC website:
<http://www.eeoc.gov/policy/guidance.html>

EEOC Policy Typically Prohibits Employment Decisions Based on Arrests

- Even where the employer did not rely on the arrest record, any pre-employment inquiry into arrests by the employer routinely violates Title VII. (1990 EEOC Arrest Guidance)
- As recognized by the EEOC guidance, CA is among the numerous states that bars employers from inquiring about arrests that do not lead to conviction. (CA Labor Code § 432.7(a))
- To establish a “business necessity” defense to consideration of arrest information, an employer has a heavy burden to prove the following:
 - The conduct must be job-related;
 - The employer must establish that the employee actually engaged in the underlying conduct alleged in the arrest; and
 - The conduct must be ~~relatively recent~~

EEOC Policy Strictly Limits Consideration of Convictions

- Business Necessity Defense:
Employers must justify employment decisions based on convictions, as follows:
 - The conviction must be “job-related” taking into account the nature and gravity of the offense or offenses, and the nature of the job held or sought; and
 - The conviction is still determinative given the time that has passed since conviction and/or completion of sentence.

- Rejected Defenses:
Significant minority representation in the employer’s existing workforce (or the “bottom line”) is not a defense to a disparate impact claim. (*Connecticut v. Teal*, 457 U.S. 440 (1982))

Examples: Convictions Not Job-Related

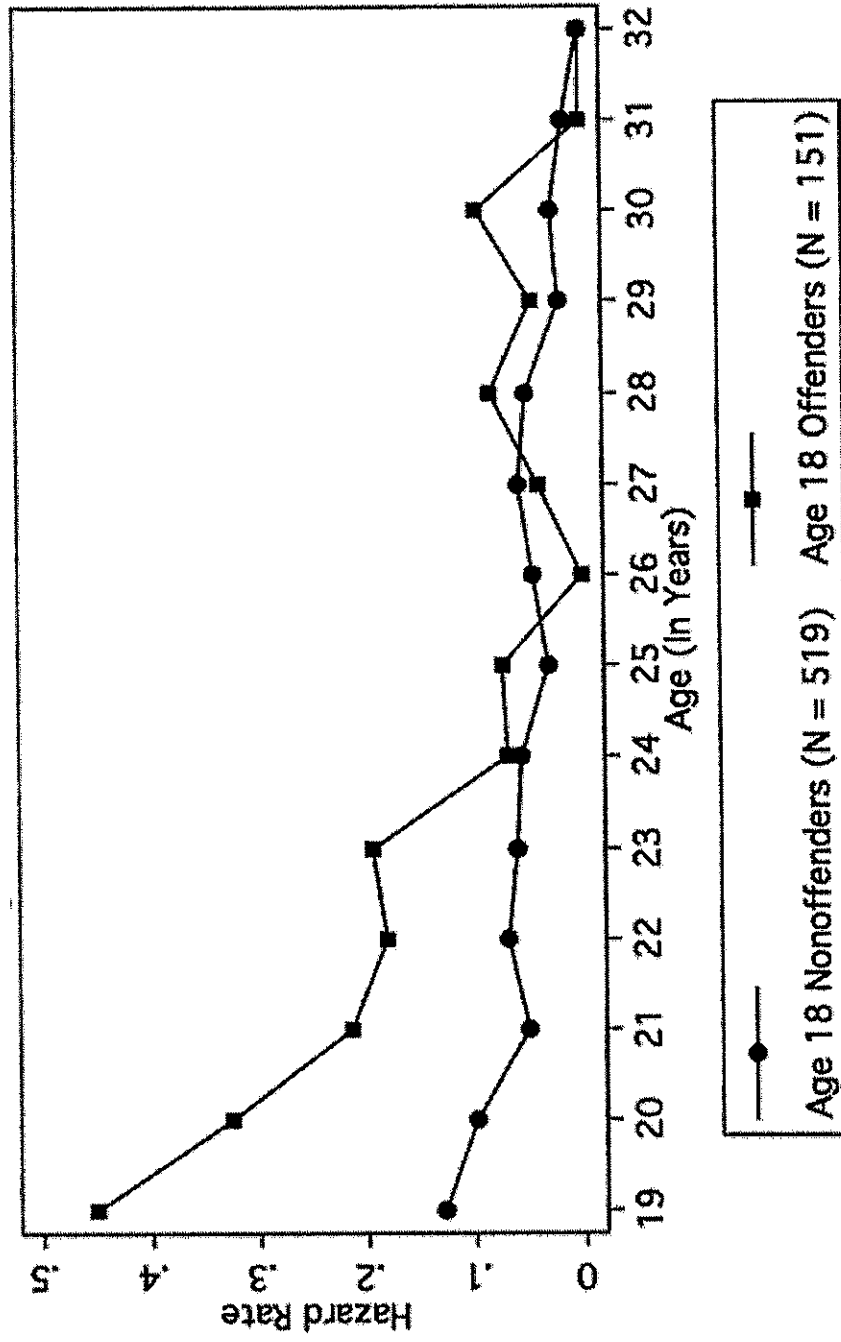
- A hit and run conviction is not job-related to a position as a kitchen worker. (EEOC Dec. No. 79-61 (May 8, 1979))
- Delivery of marijuana is not job-related to the position of utility worker in a factory. (EEOC Dec. No. 80-18 (August 18, 1980))
- Murder is not job-related to crane operator position. (EEOC Decision No. 80-17 (August 12, 1980))
- Unlawful possession of a firearm is not job-related to a factory worker position. (EEOC Dec. No. 80-10 (August 1, 1980))

Examples:

Old Convictions No Longer Relevant

- “...[C]onviction for forgery is job-related to a position requiring the handling of money payments. However, the conviction occurred six years” before applying for the position. (EEOC Dec. No. 80-16 (August 8, 1980))
- “A conviction for theft from a retail store is related to a job [with] access to and responsibility for cash and merchandise.... However, the offense is not of a serious nature and almost four years elapsed between the conviction and the date of the termination of the Charging Party.” (EEOC Dec. No. 81-15 (January 9, 1981))

After 5 Years, Offenders No More Likely Than Non-Offenders to Be Re-Arrested
 (Kurlychek, et al. "Scarlet Letters & Recidivism: Does An Old Criminal Record Predict Future Criminal Behavior?," 2006)



CalJOBS Listings that Violate Title VII

Job Title: GENERAL LABORERS (sic) NEEDED!!!!

Rate of Pay: \$8.00/hour

Job Duties: Looking for general laborers (sic) to work for a food processing plant in Hayward making sandwiches (sic). *You must have a clean record*

Job Title: FORKLIFT OPERATORS

Rate of Pay: \$10.00/hour

Job Duties: PLEASE NOTE: A Criminal Background check and Drug Screen are required for these positions. If you cannot pass BOTH, you need not apply. ... We are a distributor of office supplies nationwide ...

Identifying Potential Title VII Violations

- Blanket Discrimination Policies- Hiring policy that denies employment to any applicant with an arrest/conviction history, including a policy evident in the job posting or other written communication.
- Written Denial (not expressly a blanket policy)- Individual receives written denial from an employer citing his or her criminal record as the basis of denial, without any more specifics regarding the “job relatedness” and/or the employer’s use of the criteria in the EEOC guidance.
- Verbal Denial- Individual told by employer that they cannot hire him or her due to a criminal record.

EEOC Mediation of Criminal Records Charges

- Most hiring discrimination cases end up in mediation because there is an insubstantial amount of information for a full investigation.
- Mediation provides an important opportunity to educate employers about policies that violate Title VII.
- More information about the EEOC's mediation program is available at:
http://www.eeoc.gov/mediate/mediation_qa.html

Prioritizing Criminal Record-Based Cases

- Identify and accept criminal records charges at intake.
- Aggressively investigate employer practices that raise a claim under the EEOC guidances.
- Develop particular investigator's expertise in evaluating Title VII complaints related to criminal records.

National Employment Law Project

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