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Strategy & Insights

How Should Employers Use Criminal History in Employment Now That The EEOC Has Issued Enforcement Guidance?

Introduction

Criminal history information can be a crucial tool in the employment decision process. During the past few years, federal agencies and state governments have been limiting, employers' use of criminal history information in the employment process through regulation, litigation, and legislation. Two days ago the Equal Employment Opportunity Commission ("EEOC") issued new guidance in an effort to limit employers' options with respect to their use of this tool. The EEOC's new *Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (the "Guidance") passed today by a 4-1 vote of the EEOC's Commissioners. See *http://www.eeoc.gov/eeoc/newsroom/release/4-25-12.cfm*.

This new Guidance's roots can be traced back to the Unites States Supreme Court's 1971 opinion in Griggs v. Duke Power Company and the more recent EEOC E-RACE (Eradicating Racism and Colorism in Employment) Initiative, which seeks, among other things, to address "21st century manifestations of discrimination" under Title VII of the Civil Rights Act of 1964. According to the EEOC, studies reveal that people of certain races, colors, and national origins are arrested more frequently than others outside of those groups. In 2011 alone, 50,060 charges of discrimination alleging race/color/national origin-based discrimination were filed with the EEOC, which accounted for 50% of the charges filed that year. See *http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm*. The new Guidance also supports its reasoning by citing studies finding that criminal history information is often incomplete and inaccurate.

The EEOC's Unilateral Move

The EEOC did not release a draft of this new Guidance for public notice and comment before finalizing it. Based on this unilateral move, many industry groups have protested against the issuance of new Guidance. It remains to be seen how far such challenges will go.

Some employer guidance was gleaned during a recent March 2012 conference where EEOC Commissioner Victoria Lipnic cautioned employers to avoid blanket policies on their use criminal history information (e.g., policies that prohibit individuals who have committed certain crimes from even being considered for employment). According to Commissioner Lipnic, employers with blanket policies will be targeted by the EEOC for investigation and even litigation. This statement was confirmed in the EEOC Guidance. Although not every EEOC investigation results in a lawsuit, an investigation alone can exhaust an employer's time, energy, and finances. This is especially true given that Commissioner Ishimaru stated in his

remarks at the public meeting that the EEOC was currently investigating hundreds of cases where employers illegally used criminal history information in employment decisions.

The EEOC's History Of Enforcement

Because the EEOC did not allow for public comment, it is unclear whether or not the EEOC's new Guidance will be upheld by the courts. Unlike Congress, the EEOC does not have the authority to create statutes or issue non-procedural regulations under Title VII. Regardless, however, the EEOC can make it difficult and costly for employers that choose not to follow this new Guidance through its investigations, enforcement actions and subsequent litigation. Either employers will face substantial costs in following the new Guidance or fighting it in court. As part of its E-RACE Initiative, the EEOC has already filed several lawsuits against companies it believes use criminal history information in a manner that creates a disparate impact on race, color, or national origin. For example:

- In January 2012, the EEOC entered into a conciliation agreement with Pepsi Beverages for $3.13 million based on allegations that Pepsi Beverages racially discriminated against African American applicants based on their criminal history information. According to its press release, the EEOC stated that its investigation revealed that Pepsi had a policy of not hiring applicants with pending criminal charges that had not resulted in convictions; and failed to hire applicants with arrests or minor conviction records.

- In September 2009, the EEOC filed a complaint against Freeman Companies (Case No. 09-CV-2573) in the District of Maryland alleging that the company's use of credit histories and criminal backgrounds as selection criteria has a "significant disparate impact on [African American] applicants and that [the company's] use of criminal history information has an adverse impact on Hispanic and male applicants." This is a nationwide class action lawsuit under Title VII that is still pending.

- In September 2008, the EEOC filed a complaint against Peoplemark, Inc. (Case No. 08-CV-0907) in the Western District of Michigan alleging that the company maintained a blanket no-hire policy that denied hiring or employment to any person with a criminal record and that such policy had a disparate impact on African American applicants. This was a nationwide class action lawsuit under Title VII. After many months of expensive discovery, it became clear that the EEOC did not have a statistical expert to rebut Peoplemark, Inc.'s expert, so the case was voluntarily dismissed in March 2010.

State And Local Laws Addressing Criminal History Information

Many states have their own laws concerning "job relatedness" requirements for an employer's use of criminal history information, including Hawaii, Kansas, Missouri, New York, Pennsylvania, and Wisconsin. Other states do not even permit employers to inquire about criminal history information on the initial written application form, subject to a couple of narrow exceptions. Although most of these states (California, Connecticut, Hawaii, Massachusetts, Minnesota, and New Mexico) apply this prohibition to public employers, both the Hawaii and Massachusetts laws also cover private employers. Some 27 cities and counties in California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and Washington also have this prohibition. Again, while these local laws apply mostly to public employers, private employers in cities in Connecticut, Massachusetts and Philadelphia are also impacted. Some of these state and local laws, such as Hawaii's law, also prohibit employers from inquiring about an applicant's criminal history information until after a conditional offer of employment is made. Additional states, cities, and counties have similar legislation currently pending.

The New EEOC Guidance

The EEOC's new Guidance consolidates and supersedes the EEOC's 1987 and 1990 policy statements concerning employers' use of criminal history information. The following are the key highlights of the new Guidance.

What An Employer Can Ask

The EEOC recommends as a best practice that employers not ask about convictions on applications. According to the EEOC, inquiries about convictions, if made, should be limited only to those that are job-related. Many employers currently ask about convictions in a blanket fashion or with minimal exclusions required by state or local laws. Per the new Guidance, employers should review their job applications and pre-employment inquiries. Even when considering convictions to determine job-relatedness, however, it is very difficult for an employer to establish whether a given conviction is job-related, and employers may need to rely on outside experts to make such an analysis.

Arrest Records

The new Guidance makes clear that use of arrest records "is not job related and consistent with business necessity." The new Guidance goes on, however, to state that an employer may make a decision on the underlying conduct if the conduct makes the individual unfit for a position. The new Guidance does not specifically discuss how, if at all, pending records are different from arrests, except to state that a person can be placed on an unpaid administrative leave while an employer investigates the underlying facts.

Factors To Consider When Evaluating Criminal History Information

It is no surprise that the EEOC reinforced its earlier guidance that bright line policies relating to the use of criminal history information will be unlawful. The good news is that the new Guidance does not contain any rule specifically limiting how far back in time an employer may consider recent criminal history information, or only a specified list of offenses—which many thought would be contained in the new Guidance. Rather, the new Guidance gives more insight into the factors that were originally set forth in the EEOC Policy Statement on the Issue of Conviction Records Under Title VII, *http://www.eeoc.gov/policy/docs/convict1.html*, as well as adding some additional factors to be considered. Based on the new Guidance, employers should consider the following factors when evaluating criminal history information and making an individualized assessment to determine:

- the nature and gravity of the offense or offenses (which the EEOC explains may be evaluating the harm caused, the legal elements of the crime, and the classification, i.e., misdemeanor or felony);
- the time that has passed since the conviction and/or completion of the sentence (which the EEOC explains as looking at particular facts and circumstances and evaluating studies of recidivism); and
- the nature of the job held or sought (which the EEOC explains requires more than examining just the job title, but also specific duties, essential functions, and environment).

Individualized Assessment

One of the biggest areas of change in the new Guidance is that the EEOC recommends that an "individualized assessment" can help employers avoid Title VII liability. Reading between the lines, although the new Guidance states that "Title VII does not necessarily require individualized assessment in all circumstances," employers may be challenged by the EEOC or private litigants if they do not do so. But, according to Commissioner Lipnic's opening statement at the public meeting yesterday, there may be instances "when particular criminal history will be so manifestly relevant to the position in question that an employer can lawfully screen out an applicant without further inquiry. A day care center need not ask an applicant to "explain" a conviction of violence against a child, nor does a pharmacy have to bend over backward to justify why it excludes convicted drug dealers from working in the pharmacy lab."

The EEOC sets forth a number of individual pieces of evidence that an employer should review when making an individualized determination including:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

This is perhaps the most concerning area of the new Guidance. Clearly, this list is extremely burdensome and will cause employers to spend time and resources in evaluating criminal history information. One saving grace is the new Guidance indicates if the applicant does not respond to the employer's attempt to gather data, the employer can make the determination without the additional information. Employers will need to evaluate if there are any criminal offenses that have a "demonstrably tight nexus to the position in question" such that an individualized assessment may be circumvented. These will likely be in rare instances.

Compliance With Other Laws

The new Guidance acknowledges that compliance with "federal laws and regulations" disqualifying convicted individuals from certain occupations is a defense to charges of discrimination. For example, convictions of theft and fraud that disqualify in the financial services industry. Also recognized as a defense in the new Guidance: denying employment based on failure to obtain a federal security clearance—if the clearance is required for the job. However, the EEOC opines that compliance with state and local laws and regulations will ***not*** shield employers from Title VII liability due to Title VII pre-emption of state and local laws. Employers should therefore evaluate whether other laws on which they may be relying as a defense to run specific criminal history or eliminate an applicant/employee are preempted by Title VII.

Next Steps For Employers

Based on the new Guidance, employers should evaluate their pre-employment and hiring practices. Because the EEOC will be enforcing Title VII with this new Guidance in mind, employers are well advised to consider adjusting their use of criminal history information in accordance with it. Whether or not the EEOC prevails in any of its enforcement actions or lawsuits, the employers in these actions will be forced to spend substantial financial resources to defend and resolve them. The new Guidance itself sets forth a few employer "best practices:"

- Employers should eliminate policies or practices that exclude people from employment based on any criminal record.
- Employers should train managers, hiring officials, and decision-makers about Title VII and its prohibition on employment discrimination.
- Employers should develop a narrowly tailored written policy and procedures for screening for criminal history information. The policy should: (i) identify essential job requirements and the actual circumstances under which the jobs are performed; (ii) determine the specific offenses that may demonstrate unfitness for performing such jobs (i.e., identify the criminal offenses based on all available evidence); (iii) determine the duration of exclusions for criminal conduct based on all available evidence (i.e., include an individualized assessment); (iv) record the justification for the policy and procedures; and (v) note and keep a record of consultations and research considered in crafting the policy and procedures.

- Employers should train managers, hiring officials, and decision-makers on how to implement the policy and procedures consistent with Title VII.
- When asking questions about criminal history information, employers should limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.
- Employers should keep information about applicants' and employees' criminal history information confidential and only use it for the purpose for which it was intended.

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