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EEOC Issues Enforcement Guidance on Use of Arrest and Conviction Records in Employment Decisions

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued Enforcement Guidance counseling employers regarding the Title VII implications of utilizing arrest and conviction records as a factor in making employment decisions. The full text of the Guidance can be found at: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VII

I. DISPARATE TREATMENT DISCRIMINATION

Title VII prohibits decisions that are based, in whole or in part, on stereotyped thinking, and evidence of an employer’s decision to reject a job applicant on the basis of a racial or ethnic stereotype concerning criminality could subject the employer to liability. According to the EEOC, evidence that might suggest an employer’s decision was motivated by such stereotypical thoughts and assumptions could take the form of:

- Biased statements that express stereotypes about criminality or derogatory comments about race, color, religion, sex, or national origin;
- Inconsistencies in the hiring process that support a showing of disparate treatment;
- Hiring of job applicants with comparable qualifications to unsuccessful applicants of a different race, color, religion, sex, or national origin;
- Employment testing that shows disparate treatment due to a protected status; and
- Statistical evidence and analysis of an employer’s workforce and applicant data.

II. DISPARATE IMPACT DISCRIMINATION

Disparate impact liability comes into play when an employer has implemented a uniform policy or practice (such as a uniform policy to reject all applicants with criminal records) that has the effect of disproportionately screening out applicants on the basis of race, color, religion, sex, or national origin. In the event a statistical disparity results from a uniform policy or practice, to avoid Title VII liability the employer must be able to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity to avoid potential liability.

In the context of a disparate impact analysis, the EEOC will consider the following:

- Information about the policy or practice and its implementation;
- The types of arrests or other criminal conduct reported to the employer;
- Training and guidance documents used by the employer;
- Applicant flow information maintained pursuant to the Uniform Guidelines on Employee Selection Procedures;

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- Workforce data;
- Criminal history and background checks;
- Statistics of demographic availability;
- Incarceration/conviction data; and/or
- Relevant labor market statistics.

The EEOC suggests two alternative means for employers to establish job relatedness and business necessity:

(1) The employer can validate the criminal conduct screen for the position in question by using the Uniform Guidelines on Employee Selection Procedures standards (if data is available and validation is possible).

(2) In the alternative, the employer can develop a targeted screen that considers at least three factors: (i) the nature of the crime, (ii) the time elapsed, and (iii) the nature of the job. Then, the employer can provide an individualized assessment opportunity for excluded individuals in order to determine whether the policy as applied is job related and consistent with business necessity by providing notice to the screened-out individual, an opportunity for the individual to demonstrate that the exclusion is inappropriate, and giving due consideration to any additional information provided, such as:

- Facts and circumstances of the offense or conduct;
- Inaccuracies in the arrest or criminal record;
- The number of convictions/offenses;
- Age and/or release from prison;
- Work experience post-conviction;
- Employment history, including length and consistency;
- Rehabilitation efforts, training, and education;
- References and other relevant information; and
- Bonding under a federal, state, or local bonding program.

Because an arrest record may not report a final disposition and may otherwise include inaccuracies, the EEOC's Guidelines discourage the use of arrest records in the hiring process. Employers that insist on considering arrest records must be very careful to thoroughly inquire into the underlying circumstances and then fully and fairly assess whether consideration of the arrest would be job related and required by business necessity. Although a conviction record alone will usually be sufficient to show that a person has engaged in a particular type of conduct, a conviction record by itself will not suffice to prove an exclusionary policy or practice is job related and consistent with business necessity.

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III. FEDERAL, STATE, AND LOCAL RESTRICTIONS

Federal Restrictions. Employers in industries that are subject to federal laws prohibiting employment of convicts in specified occupations need not be concerned that compliance with this requirement will trigger Title VII exposure. Law enforcement officers, bank employees, and child care workers are some of the examples provided by the EEOC; however, employers must be careful not to apply these exceptions beyond the specific scope described in the applicable statute. Other industries, such as the transportation industry, require occupational licenses and registrations for various activities. Further examples of restrictions include the security clearances and suitability requirements imposed by the federal government as an employer or contractor.

State and Local Restrictions. According to the EEOC, state and local restrictions are preempted by Title VII and federal law if they require or permit any unlawful employment practice and, in such circumstances, would not provide a defense to discrimination charges. Nevertheless, the EEOC notes that many state and local restrictions resulting in a statistically disparate impact on a protected class are still defensible as job related and consistent with business necessity.

IV. EEOC GUIDANCE ON EMPLOYER BEST PRACTICES

In its Guidance, the EEOC provides the following examples of best practices for employers that choose to consider arrest and/or criminal records when making employment decisions.

- Eliminate broad-based practices that exclude job applicants based on any criminal record.
- Develop a written policy and procedure for screening job applicants for criminal conduct.
 - Identify essential job requirements.
 - Determine specific offenses that may demonstrate inappropriateness.
 - Identify criminal offenses of the applicant.
 - Apply exclusions appropriately and include an individualized assessment.
 - Identify the purpose of the policy.
 - Keep accurate records of consultations and research in developing the policy.
- Conduct training for managers, hiring officials, and other decision-makers so that people are informed about Title VII and the federal prohibition on employment discrimination as well as how to implement the company's policies and procedures.
- Keep criminal records and applicants' information confidential throughout the process.

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