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EEOC Advisory Guidance Offers Insight on the Use of Arrest and Conviction Records

By Rod M. Fliegel and Jennifer L. Mora

In July 2011, the Equal Employment Opportunity Commission (EEOC) held its latest meeting on the topic of protections for job applicants with arrest and conviction records under Title VII of the Civil Rights Act of 1964. The full Commission heard remarks from the panelists about "Best Practices From Employers" and related topics.[1] Although the EEOC clearly has renewed its focus on the hiring process, including Title VII protections for ex-offenders, many employers were disappointed that the EEOC did not reveal at the meeting whether it will update its 1987 Policy Statement on the Issue of Conviction Records under Title VII.[2] Notably, one of the Commissioners referenced at the hearing the U.S. Court of Appeals for the Third Circuit's decision in *El v. South Eastern Pennsylvania Transportation Authority* (SEPTA),[3] in which the court expressly criticized the 1987 Policy Statement as "vague."

Now, the first post-July 2011 meeting advisory opinion letter from the EEOC's Office of Legal Counsel[4] provides some insight into the Commission's current enforcement position. The non-binding letter suggests the Commission: (1) will continue to differentiate between arrest and conviction records; (2) may not be prepared to adopt a *presumption* of disparate impact in this context; and (3) will in the event of a finding of disparate impact, closely scrutinize the employer's policy with regard to both how long convictions are disqualifying and whether the underlying criminal conduct is related to the job duties for the position in question.

Notably, with respect to the disqualification period for prior convictions, the advisory letter recommended only asking job applicants to disclose convictions "that have taken place in the past seven years." The letter offers no explanation for why the cutoff should be seven years and, somewhat curiously, makes no direct reference to the Third Circuit's opinion in *El*. Thus, the letter provides some insight into the Commission's current enforcement position, but is far from the type of persuasive authority that employers who must balance Title VII and negligent hiring risks have been awaiting for several years.

Summary of the Advisory Opinion Letter

The advisory opinion letter was written in response to a request for comments from the Peace Corps about its proposed application for volunteer positions with its international service programs. The following provisions in the application were of concern to the EEOC staff attorney:

- A statement that applicants with certain types of drug or alcohol-related charges, arrests or

convictions (including citations) in their criminal history were not eligible to have their application considered until one year had passed from the date of the charge, arrest or conviction, whichever is later.

- A statement that a federal background check would "reveal all arrests regardless of disposition (*i.e.*, suspended sentence, deferred judgment, dismissal, not guilty, reduced charge, mistaken identity, or expungement)."
- A request that individuals state, among other things, whether they had been arrested, charged with or convicted of any alcohol or drug-related offenses or charged or convicted of any felony offense, whether they were subject to any pending charges or probation for "any criminal offense," and whether they had been "arrested for, or charged with, or convicted of any offense."

The EEOC staff attorney noted at the outset that a pre-employment *inquiry* concerning criminal records "does not in itself violate Title VII because Title VII does not regulate inquiries by employers." However, the EEOC staff attorney further commented that the use of criminal record information as part of its screening process may violate Title VII if the employer intentionally and selectively enforces its screening policy against protected class members. The EEOC staff attorney further remarked that, *if* the employer's screening policy in fact has a disparate impact on protected class members, the policy must be "job related and consistent with business necessity." It is this statement by the EEOC staff attorney, which presupposes that proof of disparate impact is *required* rather than *presumed*, that suggests the Commission may not be prepared to adopt a presumption of disparate impact.

The applicable standard for business necessity, the EEOC staff attorney continued, varies for arrest and conviction records because only the latter are a reliable indicator of guilt.

Conviction Records: In order to exclude an applicant based on a criminal conviction, the EEOC staff attorney stated, the criminal conduct should be "recent enough" and "sufficiently job-related to be *predictive* of performance in the position sought, given its duties and responsibilities." (emphasis added). Given this framework, which implicitly incorporates the Third Circuit's analysis in *El*, the EEOC staff attorney was troubled by the Peace Corps' application because it asked about "*all* convictions regardless of when they occurred." Thus, the EEOC staff attorney recommended that the employer narrow its criminal history inquiry to focus on "convictions that are related to the specific positions in question, and that have taken place in the past seven years, consistent with the proposed provisions of the federal government's general employment application form."[5] (In June 2011, the same EEOC staff attorney made a similar suggestion in an advisory opinion letter to the U.S. Census Bureau.[6])

Arrest Records: Next, the EEOC staff attorney analyzed the employer's request that the applicant provide information about criminal *arrests*, noting: "[a]rrest records, by their nature, should be treated differently from conviction records." The EEOC staff attorney explained that, because the criminal justice system requires the highest degree of proof for a conviction (*i.e.*, "beyond a reasonable doubt"), a conviction record can serve as a sufficient indication that the person in fact committed the offense. On the other hand, the EEOC staff attorney stated, arrest records are unreliable indicators of guilt because: (1) individuals are presumed innocent until proven guilty or charges may be dismissed and, therefore, an arrest record is not persuasive evidence that the person actually engaged in the conduct alleged; (2) an applicant's criminal history information may be incomplete and may not reflect that his or her arrest charges have been modified or dropped because some state criminal record repositories fail to report the final disposition of an arrest; and (3) arrest records may be inaccurate due to a variety of other factors (*e.g.*, confusion regarding names and personal identifying information, misspellings, clerical errors, or because the individual provided inaccurate information at the time of arrest).

With this framework in mind, the EEOC staff attorney advised the employer to "consider whether its questions about arrests and charges will serve a useful purpose in screening applicants" and, if so, she recommended that the employer only ask about arrests and charges for offenses that are related to the position in question. In order to ensure that the employer relies on accurate arrest-related information when considering an individual for a volunteer position, the EEOC staff attorney recommended that the employer also give the applicant a reasonable opportunity to dispute the validity of any information showing that the applicant has an arrest record. (This varies somewhat from prior and impractical EEOC guidance suggesting that an employer should make an effort to try to independently confirm whether the applicant in fact was guilty.[7])

Implications for Employers

The advisory staff opinion letter expressly and properly states that it "does not constitute an official opinion of the Commission." Nonetheless,

it suggests that one of the EEOC's continuing priorities is to regulate the use of criminal records by employers. Whether recent budget cuts will affect the EEOC's ability to prosecute such claims remains to be seen, but, in the meantime, employers may consider the following action items:

- Employers should consider conducting a privileged review of their conviction-based screening policies to help identify any areas that may increase the risk of disparate impact claims (*e.g.*, lengthy disqualification periods for ex-offenders) and determine how any potential risk balances out against negligent hiring and other risks (*e.g.*, mandatory screening requirements for regulated employers, such as financial institutions).
- Because various laws affect the use of criminal records for employment purposes, such as Title VII, the federal Fair Credit Reporting Act (FCRA) and state fair employment and fair credit reporting laws, employers should continue to be mindful of their obligations to comply with *all* of these laws. Notably, there has been a striking increase in the number of class action lawsuits filed against employers for violating the FCRA and its state equivalents.

Rod Fliegel is a Shareholder in Littler Mendelson's San Francisco office, and Jennifer Mora is an Associate in the Los Angeles office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Fliegel at rfliegel@littler.com, or Ms. Mora at jmora@littler.com.

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[1] http://www.littler.com/publication-press/publication/eeocs-priorities-still-include-regulating-use-criminal-records-employe

[2] www.eeoc.gov/policy/docs/convict1.html.

[3] 479 F.3d 232 (3rd Cir. 2007).

[4] www.eeoc.gov/eeoc/foia/letters/2011/title_vii_criminal_record_peace_corps_application.html.

[5] 75 Fed. Reg. 67,145, 67,146 (Nov. 1, 2010) (the Office of Personnel Management proposed that its general employment application form be revised to limit the scope of the collection of criminal history information to the past seven years rather than the past 10 years).

[6] www.eeoc.gov/eeoc/foia/letters/2011/titlevii_crimial_history.html.

[7] www.eeoc.gov/policy/docs/arrest_records.html.