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EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers

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For the past few years, the Equal Employment Opportunity Commission (EEOC) has publicly discussed the need to update its enforcement guidance concerning the use of arrest and conviction records in hiring and employment.[1] This was an area of significant interest for employers in virtually all industries, especially after the EEOC publicly announced its $3.13 million settlement with Pepsi concerning criminal records in January 2012.[2] After several false starts, the EEOC issued its final updated enforcement guidance, the product of a 4-1 vote by the Commission members on April 25, 2012, titled "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964."[3] The updated guidance, and the EEOC's related Q&A document,[4] do not prohibit employers from using criminal records, and indeed outline what the EEOC considers recommended best practices. However, the practical implications and day-to-day application of the updated guidance (even considering its surprisingly moderate tone) raise a raft of questions and strategic considerations for employers. This is in part due to the EEOC's strenuous emphasis on the need, in its view, for employers to conduct an "individualized assessment" of each potentially disqualified ex-offender applicant and employee.

Below, we summarize the high points of the updated enforcement guidance. We also provide plain-spoken answers to some of the more immediate questions, including whether the updated guidance will be entitled to deference from the courts. Although we do not delve deeply into related considerations, such as the interplay between the guidance and the Fair Credit Reporting Act (FCRA), employers should continue to be mindful of their obligations under these laws when using criminal background reports provided by third-party consumer reporting agencies (CRAs).[5] In addition, employers should continue to be mindful of the fair employment laws in some states that extend various protections to ex-offenders as "ex-offenders," rather than as members of an otherwise protected class.[6]

Executive Summary

The EEOC's initial focus in the guidance is background data. First, the EEOC relates statistics, studies and commentary by various experts regarding the disproportionate arrest and conviction rates for African Americans and Hispanics.[7] Second, the EEOC describes the various public and private sources for obtaining criminal records, noting that studies have found that certain criminal record databases may include incomplete and inaccurate records. The guidance also references

the increased use of criminal background checks by employers, citing, for example, a 2010 Society for Human Resource Management survey reporting that 92% of the responding employers used, in one format or another, criminal background checks.

Intentional Discrimination

The guidance next addresses the non-controversial subject of intentional or "disparate treatment" discrimination. The guidance reiterates the common-sense proposition that an employer must apply its screening standards in an even-handed manner as between similarly situated applicants of different racial and ethnic backgrounds.

Disparate Impact Discrimination

The next section of the guidance is likely the subject of greatest interest: "disparate impact" discrimination. The EEOC reiterates its long-standing view that, although Title VII does not protect ex-offenders as a protected class *per se*, unlawful discrimination may result from the administration of a facially-neutral policy or procedure; specifically, criminal record screening policies that disproportionately affect protected class members. If a disparate impact resulting from these policies is shown, the EEOC maintains that the employer can be liable for discrimination unless it can demonstrate that its policy is job related for the positions in question and consistent with business necessity. Even then, a Title VII plaintiff may prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice.

The guidance also addresses the EEOC's approach to the threshold question of determining disparate impact. The EEOC does not go so far as to state that the Commission will presume a disparate impact based on the national data concerning arrest and conviction rates, but does express the Commission's view that national data "support" such a finding. The guidance explains that, in the course of an EEOC investigation, an employer may show, by competent evidence, that its policy in fact does not result in a disparate impact (*e.g.*, that in the employer's particular geographic area, African American and/or Hispanic men are not arrested and convicted at disproportionately higher rates).

With regard to the question of establishing disparate impact (or the lack thereof), the guidance states that "evidence of a racially balanced workforce will not be enough to disprove disparate impact." The guidance further states that the Commission "will closely consider whether an employer has a reputation in the community for excluding individuals with criminal records." The guidance does not explain how an employer's "reputation" will be proved—or offer assurances that "reputation" evidence will be reliably developed.

Business Necessity

The EEOC devotes considerable discussion to the standard for defending a criminal record screening policy as job related and consistent with business necessity. The Commission begins by distinguishing between arrest records and conviction records.

With regard to arrest records, the EEOC reiterates its view that such records are of limited value because the fact of arrest does not establish that the underlying criminal conduct occurred. However, the EEOC concedes the possibility that some types of underlying conduct resulting in arrest may "make the individual unfit for the position in question." In those limited cases, the employer may rely on the conduct. Unlike the prior iteration of the enforcement guidance, the EEOC does not expressly task the employer with trying to assess the likelihood that the applicant actually engaged in the alleged criminal conduct, but this obligation is implied by one of the EEOC's examples.

The EEOC views criminal convictions differently than arrests because a record of a conviction "will usually serve as sufficient evidence that a person engaged in particular conduct, given the procedural safeguards associated with trials and guilty pleas." However, the EEOC recommends caution, on the grounds that "there may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction." The guidance provides as examples a database that continues to report a conviction that was later expunged or a felony that was later reduced to a misdemeanor.

Turning to conviction record screening policies, the guidance states that an "employer needs to show that the policy operates to *effectively link* specific criminal conduct and its dangers with the risks inherent in the duties of a particular position." The EEOC offers two examples where "employers will consistently meet the 'job related and consistent with business necessity' defense."

First, if the employer "validates" the criminal conduct screen for the position at issue by relying on the three different approaches set forth in the Uniform Guidelines on Employee Selection Procedures. The EEOC appears to recognize the very significant data challenges associated with formal validation in this context.

Second, an employer may deploy a "targeted screen" that considers the three *Green* factors (derived from *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1975), which have been the centerpiece of the EEOC's guidance for the past 25 years): (1) the nature and gravity of the offense; (2) the time that has passed since the offense and/or completion of the sentence; and (3) the nature of the job held or sought.

The guidance adds some "flesh to the bones" in describing how these factors should be used, but most importantly takes the position that an "individualized assessment" should be made by an employer in virtually all instances before the employer disqualifies an individual for employment based on past criminal conduct. The guidance enumerates the following specific factors for an employer to consider in this assessment: (1) the facts or circumstances surrounding the offense or conduct; (2) the number of offenses for which the individual was convicted; (3) older age at the time of conviction or release from prison; (4) 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; (5) the length and consistency of employment history before and after the offense or conduct; (6) rehabilitation efforts, *e.g.*, education and training; (7) employment or character references and any other information regarding fitness for the particular position; and (8) whether the individual is bonded under a federal, state, or local bonding program.

The EEOC's guidance provides that where an applicant or employee does not respond to requests for such information, the employer may make its employment decision without the information. The EEOC also acknowledges that an employer may be able to justify a targeted criminal records screen solely under the *Green* factors (*i.e.*, one *without* an individualized inquiry), but only where the targeted records screen is "narrowly tailored to identify criminal conduct with a *demonstrably tight nexus* to the position in question."

If an employer conducts an individualized assessment, the guidance suggests that the employer: (1) inform the applicant that he or she may be excluded based on the past criminal conduct; (2) provide an opportunity to the individual to establish that the exclusion should not apply; and (3) consider whether the individual assessment shows that the policy should not be applied to the applicant.

The guidance recognizes that some state and local laws may restrict or prohibit the employment of individuals with records of certain criminal conduct. However, in the EEOC's view, Title VII preempts state and local laws if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice under Title VII." As a result, the EEOC takes the position that if an employer's exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation will not shield the employer from Title VII liability.

The updated guidance concludes with recommended Employer Best Practices, *i.e.*, the EEOC's framework for employers to follow in creating a "narrowly tailored written policy and procedures for screening for criminal records." In keeping with the Best Practices, employers must identify essential job requirements and the "actual circumstances under which the jobs are performed," determine the specific offenses that may demonstrate unfitness for performing such jobs, and determine the duration of exclusions for criminal conduct (including an individualized assessment). The EEOC further recommends recording the justification for the policy and procedure, providing related training and education to managers, hiring officials and decisionmakers, and maintaining criminal record information in a confidential manner. (Section VIII, Employer Best Practices.)

Answers to Pressing and Immediate Questions

Is the updated enforcement guidance now "the law"?

The guidance represents the Commission's construction of Title VII. The federal and state courts are not literally bound by and do not have to "defer" to the guidance. Indeed, the EEOC issued this guidance in part because of criticism of its prior guidance as unpersuasive by the U.S. Court of Appeals for the Third Circuit. That said, it is a certainty that the Commission will rely on its guidance in administrative enforcement actions, and at least some courts are likely to defer to the guidance based on the EEOC's role in enforcing Title VII since the statute's enactment in 1965.

Did the EEOC prohibit employers from asking about criminal records on employment applications or early in the hiring process?

No. The guidance notes that some states require employers to wait until late in the hiring process to ask about conviction records, but the EEOC only "recommends" that employers not ask about convictions on job applications. If employers do so, however, the EEOC advises that such inquiries be "limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity."

Did the EEOC prohibit employers from considering criminal records in hiring and employment decisions?

No. The EEOC takes the position that employers should be circumspect in using criminal records, based largely on the national data concerning disproportionate arrest and conviction rates, but does not purport to outright prohibit employers from considering criminal records.

Is the EEOC going to presume disparate impact in its investigations?

The EEOC stops short of saying that it will presume a disparate impact from the use of arrest and/or conviction data, but does state that the national data "support" a finding with regard to race and national origin. An employer defending a charge of discrimination on this basis will have the opportunity to contest a finding of disparate impact based, for example, on data concerning local arrest and conviction rates for protected class members.

To satisfy the business necessity standard, is the EEOC requiring formal validation of a criminal record screening policy?

No. The EEOC takes the position that formal validation is one way to satisfy the business necessity standard (though an unlikely one, based on significant data challenges), but states an alternative is to deploy what it calls a "targeted screen," *i.e.*, a screen that incorporates the *Green* factors, and in most instances provides an opportunity for an individualized assessment of potentially disqualified ex-offenders. The EEOC enumerates a list of factors to consider.

Did the EEOC address the significance of older criminal history information, a question that garnered significant attention at the Commission's public meetings?

Yes. One of the factors for determining whether use of conviction records is job related and consistent with business necessity, according to the EEOC, is the time that has passed since the offense, conduct and completion of the sentence. However, the EEOC does not suggest, much less define, a bright-line standard in this regard. In fact, the EEOC says that whether the "duration of an exclusion will be sufficiently tailored to justify the business necessity standard will depend on the particular facts and circumstances of each case." The EEOC further notes that academic studies demonstrate the risk of recidivism declines over time, and these studies may inform an employer's consideration of aged conviction or arrest data.[8]

Can an employer still use a consumer reporting agency (or background screening company) to gather and report the criminal history information?

Yes. The guidance does not purport to prohibit employers from using consumer reporting agencies to provide background check reports, but does seem to warn employers away from using such agencies when they provide unreliable information.

Does it matter whether an employer is subject to regulatory requirements?

Yes. The EEOC acknowledges that some employers are subject to regulatory requirements, but cautions employers about adopting screening policies that exceed those requirements.

Conclusion

Employers that use or are considering using criminal records to screen applicants or employees should consider the following:

- Employers who want to assess potential disparate impact risks should consider conducting a privileged review of their criminal record-based screening policies and procedures to help identify areas of opportunity in terms of fortifying the policies and procedures as defensible under Title VII.
- Employers should continue to be mindful of, and comply with, the various laws that impact the use of criminal records in addition to Title VII, including state fair employment laws and the federal and state fair credit reporting laws, such as the FCRA.

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[1] *See* Rod Fliegel and Barry Hartstein, *The EEOC's Priorities Still Include Regulating the Use of Criminal Records by Employers*, Littler ASAP (July 27, 2011), www.littler.com/publication-press/publication/eeocs-priorities-still-include-regulating-use-criminal-records-employe.

[2] Press Release, EEOC, Pepsi to Pay $3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012), *available at* www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm.

[3] *Available at* www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[4] EEOC, *Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII*, www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.

[5] *See* Rod Fliegel and Jennifer Mora, *The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers*, Littler Report (Dec. 12, 2011), available at www.littler.com/publication-press/publication/ftc-staff-report-40-years-experience-fair-credit-reporting-act-illumin.

[6] *See* Christopher Kaczmarek, Carie Torrence, and Joseph Lazazzero, *Massachusetts Employers Face New Obligations When Conducting Background Checks Involving Criminal History Records*, Littler ASAP (Mar. 9, 2012), http://www.littler.com/publication-press/publication/massachusetts-employers-face-new-obligations-when-conducting-backgroun.

[7] The guidance includes 26 pages of text and 26 additional pages of footnotes citing various studies and publications as well as the testimony and supporting statements of those who appeared at the EEOC Commission meetings in November 2008 and July 2011. The annotated and detailed guidance was issued by the EEOC apparently in part in direct response to criticism of its prior enforcement guidance by the Third Circuit in *El v Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3rd Cir. 2007).

[8] *See also* Rod Fliegel and Jennifer Mora, *EEOC Advisory Guidance Offers Insight on the Use of Arrest and Conviction Records*, Littler ASAP (Oct. 25, 2011), www.littler.com/publication-press/publication/eeoc-advisory-guidance-offers-insight-use-arrest-and-conviction-record (discussing a recent advisory letter from the EEOC that recommended asking job applicants to disclose only convictions "that have taken place in the past seven years").