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On April 25, 2012, the U.S. Equal Employment Opportunity Commission (the "EEOC") issued Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (the "Guidance"). The Guidance is the EEOC's first formal policy statement on this topic in 20 years, and the first since the 1991 Civil Rights Act codified Title VII's employment discrimination disparate impact analysis. The development is particularly timely, as the proliferation of online databases now makes it easier than ever for employers to learn an individual's criminal record history.

The crux of the Guidance is that an employer's reliance on an individual's criminal record history in making employment decisions may, in some instances, give rise to an employment discrimination claim under Title VII based on race and/or national origin. Although the Guidance is new, this is not a new position for the EEOC—the agency has been expressing concern about the use of criminal record history in employment decisions and its potential for Title VII liability for decades. The current Guidance builds on prior federal court decisions, prior EEOC compliance materials, and past EEOC policy statements from 1987 and 1990.

The Guidance draws a sharp distinction between records of arrest and records of conviction. The EEOC's position is that an arrest record is not evidence that an individual actually engaged in criminal conduct, and therefore the use of arrest records in employment decisions typically will not pass muster. Further, some states have adopted laws that restrict an employer's ability to consider records of arrest that did not lead to conviction. Thus, it is critical that any employer who is considering relying on such an arrest record first check with local counsel in the appropriate state.

Unlike arrest records, the EEOC considers conviction records to be reliable evidence that the underlying criminal conduct actually occurred. Therefore, the EEOC recognizes that it may be appropriate in certain circumstances for employers to rely upon conviction records for employment purposes—provided that they do so in a manner that does not violate Title VII (and again, employers should always check applicable state law). Exactly when and how employers may do this is the focus of the Guidance.

Title VII recognizes two species of employment discrimination claims: "disparate treatment" claims (i.e., intentional discrimination based on a protected characteristic) and "disparate impact" claims (i.e., when facially neutral policies or practices have the effect of disadvantaging a protected group). The Guidance notes that the improper use of an applicant's criminal record history could conceivably give rise to both types of claims.

A disparate treatment claim could arise if an employer treats criminal history information differently for different applicants (for example, disqualifying from employment all minority applicants, but not all non-minority applicants, with prior convictions). However, even where an employer's policy treats all applicants the same—for example, a blanket policy excluding any applicant with a prior conviction from employment, regardless of race—a disparate impact claim could still arise. As the Guidance explains, such facially neutral policies may still adversely impact certain racial and ethnic groups, which studies have shown to be convicted of crimes in numbers disproportionate to their representation in the general population. Thus, these "automatic disqualification" policies may violate Title VII unless the employer can show that they are job-related and consistent with business necessity.

Federal laws or regulations restricting or prohibiting the employment of individuals with certain criminal records, where applicable, would provide a defense to a disparate impact claim. In addition, the Guidance offers two scenarios in which the EEOC believes that the consideration of an applicant's conviction record would meet the "job-related and consistent with business necessity" test.

First, an employer could "validate" a criminal conduct exclusion for a particular job position, consistent with the EEOC's Uniform Guidelines on Employee Selection Procedure. This avenue is available to the extent there is existing data or analysis regarding the

relationship between individuals' past criminal conduct and their subsequent work performance or behaviors. The validation process may take different forms, but the aim of any validity study is to determine whether a certain selection criterion (here, criminal conduct) is correlated with certain desired work behaviors or an individual's job performance. The downside of this approach is that the validation process may be complex and costly—particularly for smaller employers.

Alternatively, employers can develop a so-called "targeted screening process" for applicants with criminal records. As opposed to a blanket disqualification rule, the targeted screening process would require a case-by-case analysis for each applicant, considering factors such as the nature of the convicted crime, the time elapsed since the crime was committed, and the nature of the job position for which the applicant is applying.

For example, most employers would consider an applicant with a recent conviction for embezzlement unsuitable for a position involving the administration of an employer's bank accounts. Under those circumstances, it would likely be job-related and consistent with business necessity to disqualify the applicant pursuant to the targeted screening process. The same may not be true, however, for an applicant with a conviction for a minor drug-related offense that occurred over 20 years ago. The point of the targeted screening process is to ensure that an individualized assessment is conducted for each applicant to determine whether, in that particular case, a criminal record exclusion is job-related and consistent with business necessity.

## Practical steps for employers

The EEOC's Guidance should prompt employers to examine their current hiring policies and practices and determine whether changes are needed to reduce the risk of Title VII liability. Areas to consider include the following:

- **Employment applications.** As a best practice, applications should ask only about prior criminal convictions, not prior arrests. (Employers should also check state law to be sure they are complying with all other restrictions on criminal record inquiries that may apply.) Employers may find it too cumbersome to tailor each individual job application to reference the specific types of crimes that may be relevant to the job position at issue. However, employers should insert blanket language in the application making clear that prior convictions are not an automatic bar to employment, and will instead be considered on a case-by-case basis in light of the nature of the offense and the position being sought.
- **Written policies and/or unwritten practices relating to criminal record history and employment.** Under the Guidance, any policy or practice that automatically disqualifies an applicant with a criminal conviction from employment (except where such exclusion is required by a federal law or regulation) is suspect and has the potential to subject the employer to Title VII liability. Instead, employers should either "validate" any criminal record exclusion pursuant to the EEOC's Uniform Guidelines on Employee Selection Procedure, or implement a targeted screening process as described above. In practice, either approach will require identifying the essential job requirements for each job position and identifying which types of criminal offenses might render a person unfit for the job, and for what length of time.
- **Train hiring managers and other personnel.** Employees connected with the hiring process should understand the potential for Title VII liability when considering an applicant's criminal record history and should be carefully trained on how to implement the targeted screening process in a manner consistent with Title VII. Employees to target for training include human resources personnel, hiring managers, interviewers and any other decision makers who may be in a position to inquire about past criminal conduct.

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