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

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The Equal Employment Opportunity Commission has approved, by a 4-1 vote, a revised 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 is effective immediately. Before disqualifying an individual with a criminal record from employment, the Commission emphasizes, employers should engage in an individualized assessment involving a dialogue with that individual. While the Guidance states that employers would not violate Title VII if they disqualify an applicant based on separate federal restrictions on the employment of persons with criminal records, an employer may not defend a decision to disqualify an individual solely on state restrictions on the hiring of persons with criminal records.

Previous EEOC Policy and Guidelines
The new Guidance replaces a 1987 EEOC Policy Statement regarding Conviction Records and a 1990 Policy Guidance on the Consideration of Arrest Records. The 1987 Policy recited statistics showing African-Americans and Hispanics are convicted at a rate disproportionately greater than their representation in the population imply that excluding individuals from employment on the basis of their conviction records had a disparate impact on these groups. Under Title VII, an employer may justify a practice that results in a disparate impact by demonstrating a business necessity for that practice. An employer can demonstrate business necessity under the 1987 Policy by showing it considered three factors in making its decision:

1. The nature and gravity of the criminal offense(s);
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.

The EEOC refers to these as the “Green factors” (as they came from Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977), in which the court found a complete bar on employment based on any criminal activity, other than a traffic violation, unlawful under Title VII). In addition to the Green factors, where arrest records show no conviction, the EEOC’s 1990 Guidance requires the employer to evaluate whether the arrest record reflects the applicant’s conduct.

Under the EEOC’s 1978 Uniform Guidelines on Employee Selection Procedures (“UGESP”), a selection procedure that adversely affects the members of any race, sex, or ethnic group will be considered discriminatory unless the selection procedure has been formally validated. 29 C.F.R. § 1607.3(a). The U.S. Supreme Court, however, has held that such formal validation studies are not required to demonstrate business necessity. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

New Enforcement Guidance
The new Guidance provides examples of an applicant’s or employee’s proper or improper disqualification based on his or her criminal record.

Targeted Screens May Satisfy Business Necessity
A common practice among large employers is to develop an internal policy regarding the types of
conclusions that will disqualify an individual from employment. The Guidance contemplates that an employer may satisfy its Title VII obligations by using an internal policy if it is “narrowly tailored.” The Guidance explains “narrowly tailored” as a “demonstrably tight nexus to the position in question. Title VII thus does not necessarily require individualized assessment in all circumstances.” The Guidance refers to “targeted screens” that are based on the Green factors, i.e., the nature of the crime, the time elapsed and the nature of the job.

**Targeted Screens Accompanied by Individualized Assessment**

The Guidance clearly prefers that a targeted screen be accompanied by notice to the individual under scrutiny and an individualized assessment of the individual and the crime and the position in question. An individualized assessment would allow the applicant or employee to explain the circumstances of the conviction and why the conviction should not exclude him or her from employment. The Guidance lists eight possible topics of consideration in an individualized assessment, including these three:

- The facts and circumstances surrounding the offense or conduct;
- 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; and
- Employment or character references and other information regarding the individual’s fitness for the particular position.

The Guidance states that if the individual does not respond to the employer's inquiries, the employer may make its decision without the information.

**Validation Study May Satisfy Business Necessity**

While the Guidance allows a validation study on an employer's use of criminal background information meeting UGESP standards to establish business necessity, the EEOC appears doubtful that data exists to allow an employer to conduct such a validation study. According to the Guidance, “Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.”

**Arrest Record Requires Inquiry into Conduct Alleged**

Individuals are “presumed innocent unless proven guilty,” thus, the Guidance says, the “arrest record standing alone may not be used to deny an employment opportunity.” However, the Guidance allows an employer to make an employment decision based on the conduct underlying the arrest if the individual would be unfit for the position because of the conduct. As illustration, the Guidance uses the situation in which an elementary school assistant principal is arrested after several young girls reported the assistant principal of inappropriate touching. School policy permits terminating employees who engage in conduct that impact the health and safety of students. The assistant principal denies committing inappropriate conduct, but the school finds the denial not credible. The school terminates his employment. In this situation, the EEOC would find no violation of Title VII because the school’s policy is linked to conduct relevant to the job and the decision is based on the underlying conduct.

**Persons Subject to Federal Prohibitions or Restrictions**

The Guidance notes federal laws and regulations prohibit the employment of persons with records of certain crimes in particular positions, e.g., child care workers in federal agencies, bank employees and port workers. It finds that Title VII does not preempt these federally imposed restrictions. Moreover, although applicable regulations may allow an employer to obtain a waiver from these restrictions, “Title VII does not mandate that an employer seek such waivers,” the Guidance states.

**State and Local Restrictions**

Perhaps the greatest concern raised by the Guidance is the Commission’s refusal to allow employers to establish business necessity based on compliance with state or local laws prohibiting the employment of persons with certain criminal convictions. According to the Guidance, an employer who takes adverse action required by state law or local regulations nonetheless must demonstrate that its policy is job-related and consistent with business necessity based on the Green factors.

**Other Relevant Points**

The Guidance observes that persons who do not actually apply for employment may have a cause of action against an employer if the potential applicant is “discouraged from applying” because an employer has a reputation in the community for excluding individuals with criminal records.
As a “best practice,” the Guidance encourages employers not to ask applicants about their criminal records. According to the EEOC, not asking about criminal records early in the application process is important because an employer is more likely to assess the relevance of an applicant’s criminal records objectively when it already knows about the applicant’s qualifications and experience.

Training managers, hiring officials and decision makers on Title VII and the non-discriminatory manner of considering criminal records is another best practice encouraged by the Guidance.

The Guidance reminds employers that the inconsistent application of their policies on criminal convictions may result in accusations of disparate treatment discrimination. The Guidance addresses disparate impact on African-Americans and Hispanics, but does not address disparate impact based on sex. While hearing testimony noted that more men than women encounter barriers to job reentry after incarceration, the Guidance is silent on this point.

**Intended Audience**

The EEOC states the new Guidance is intended for employers, individuals who suspect they have been denied employment because of their criminal records and Commission staff investigating discrimination charges. In the past, the EEOC has cited its enforcement guidances in court as persuasive authority for the interpretation of Title VII and some courts have deferred to agency guidances seeking to impose obligations beyond those expressed in the laws.

**Operating in the New Legal Environment**

The Guidance shows the Commission accepts criminal background checks as a common employment practice. (It notes one survey showing 92 percent of responding employers utilize criminal background checks.) In the Guidance’s accompanying “Questions and Answers,” the EEOC acknowledges that criminal background checks are not prohibited by Title VII. Nevertheless, employers should review the Guidance and, with human resources and loss prevention officials and in-house or outside counsel, evaluate and revise their policies and practices in accordance with the “Best Practices” provided in the Guidance.

This step is especially important for employers that have multiple hiring locations and utilize background checks frequently. The EEOC has taken the position that it can expand any individual charge into a systemic discrimination investigation. “Big numbers are bad numbers” and large numbers of applicants are likely to produce statistically significant adverse impact trends. When that occurs, employers will be required to utilize individualized assessment, targeted screens or conduct a validation study under the new EEOC Guidance. Experienced Jackson Lewis attorneys and statisticians can assist employers to prepare statistical analyses, under privilege, to determine if a background check is causing adverse impact, and to provide strategic advice on how to reduce any impact.

Jackson Lewis attorneys are available to advise employers on whether they are following best practices for considering criminal conviction records consistent with applicable federal and state law, as well as the new Guidance, and to offer necessary management training.

We will be conducting a webinar to address the Guidance in more detail. Meanwhile, please contact your Jackson Lewis attorney with any questions.

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