

Employers Beware: EEOC Limits Use of Criminal Records

By Hope Eastman

On April 25, 2012, the EEOC issued updated Enforcement Guidance on employers' use of criminal background checks to screen applicants. Citing statistics showing that blanket prohibitions on hiring those with criminal records have a disproportionate impact on minorities, the EEOC expanded the circumstances where a criminal background check policy or practice may run afoul of Title VII – creating greater risk of liability for employers.

The enforcement guidance does not have the force of a regulation but will be the basis for EEOC challenges to widespread employer practices, starting with the more than 100 charges pending at the EEOC containing discrimination claims based on criminal records. Jacqueline Berrien, who chairs the EEOC, said in a written statement that the new guidance “clarifies and updates the EEOC’s longstanding policy concerning the use of arrest and conviction records in employment.” However, the burden put on employers to conduct a newly emphasized individualized assessment will be greater under the new guidance.

This long-awaited guidance has been a key goal for employee advocates who have argued that stricter limits are needed on employer use of criminal records in order to reintegrate those who have been incarcerated back into society. Many have argued that screening out those who have been convicted, along with the common bans on their voting, makes this impossible. The Commission cited statistics showing that 1 in 17 Caucasian American men are expected to be incarcerated during their lifetime, but that 1 in 3 African American males and 1 in 6 Hispanic males will be incarcerated. In a statement issued about the new EEOC Guidance, NAACP President Benjamin stated, “Our criminal justice system is deeply biased against people of color and that disparity can carry over to the job search. These guidelines will discourage employers from discriminating against applicants who have paid their debt to society.”

Employers have argued that access to such information is necessary to protect against fraud, theft, and violence in the workplace and to protect against subsequent lawsuits for negligent hiring. Employer practices range from outright bans on employing those with a criminal history to more nuanced review of individual cases. The problem is especially acute for the largest employers who process hundreds of thousands, if not millions of applications each year.

In the guidance, the EEOC has bluntly informed employers that:

- Exclusion based on arrest records is NOT job-related and consistent with business necessity and will be considered prohibited racial and/or natural origin discrimination.
- A blanket bar against employment of applicants with criminal conviction records is also not job-related and consistent with business necessity and will be considered prohibited discrimination.
- Employers should base hiring decisions on an “individualized assessment” of an applicant’s fitness for the job, and an applicant’s criminal record is relevant only if the conduct involved is “job related for the position in question,” according to the guidance.
- Federal laws requiring such checks will trump the EEOC policy, BUT similar state laws will NOT protect employers from EEOC findings of discrimination.

The Guidance also includes some suggested best practices for employers, including not asking for conviction information on job applications, training managers and decision-makers about Title VII’s prohibition on employment discrimination, and focusing on the underlying conduct, not the arrest or conviction. It also provided some insight into what it might consider a non-discriminatory criminal background check policy. The recommended steps include identifying essential job duties and the specific criminal offenses that may demonstrate unfitness for performing these duties; determining the appropriate time elapsed for the excluded criminal conduct; including an individual assessment; and keeping records on the research, development and justification regarding the policy and procedures.

The Guidance and Q & A document can be found at www.eeoc.gov. Paley Rothman's Employment Law Group can also assist employers in reviewing and revising current criminal background check policies.