

# HOT TOPIC

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## **EEOC Issues Comprehensive Guidance Regarding Employers' Use of Criminal Background Information**

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued Enforcement Guidance No. 915.002 regarding employers' use of criminal background information of employees and job applicants. Although the Guidance does not significantly alter the analytical framework and legal standards under which the EEOC determines whether an employer's use of criminal background information violates Title VII, the Guidance consolidates, updates, and elaborates upon the EEOC's previous statements and represents the most comprehensive guidance yet from the EEOC on this issue.

The EEOC issued the Guidance in light of the increasing number of persons coming into contact with the criminal justice system, and the increasing number of employers subjecting job applicants to criminal background checks (92%, according to one study the EEOC cites). Because African Americans and Hispanics are arrested and incarcerated at much greater rates than the non-minority population, the EEOC has long taken the position that an employer's use of criminal background history in making employment decisions may constitute discrimination on the basis of race or national origin, in violation of Title VII.

Such discrimination may be found under two theories of liability: disparate treatment and disparate impact. Under a disparate treatment theory, an employer violates Title VII by treating a person's criminal history differently in light of his or her race or national origin. For example, it is unlawful in the hiring process to offer white candidates the opportunity to explain away a criminal history while denying that opportunity to minorities. The EEOC also considers statements expressing "group-related stereotypes about criminality" to be an indication of impermissible disparate treatment.

Under the disparate impact theory, an employer's facially neutral policy or practice with respect to criminal backgrounds may violate Title VII if it (i) has the effect of disproportionately "screening out" a protected group (i.e., disparate impact), and (ii) the employer fails to demonstrate that the policy or practice is "job-related for the position in question and consistent with business necessity." With respect to the disparate impact finding, the EEOC has determined that the national data concerning greater arrest and incarceration rates for African Americans and

Hispanics, standing alone, is sufficient for a finding of disparate impact for those protected groups. However, an employer will have the opportunity to rebut that finding by pointing to local or regional data that contradicts the national data, or by using its own applicant data to show a lack of disparate impact. The EEOC will also consider whether applicants in a protected group have been discouraged from applying for employment, including by looking to an employer's "reputation in the community for excluding individuals with criminal records."

Once a disparate-impact finding is made, the burden shifts to the employer to show that its policy or practice regarding the use of criminal-background information is job-related for the position in question and consistent with business necessity. Here the Guidance contains the EEOC's most extensive discussion to date on that issue.

As an evidentiary matter, the EEOC draws a sharp distinction between arrests and convictions. The EEOC considers a conviction to be conclusive evidence of criminal conduct. An arrest, however, does not of itself establish that criminal conduct has occurred. The EEOC also warns that the various electronic databases that yield criminal-background information--typically maintained in state and federal court systems, by agencies including the FBI, and by private third-party vendors--often contain inaccurate information and do not report the ultimate disposition of a charge or whether it has been expunged. For those reasons, "an arrest record standing alone may not be used to deny an employment opportunity." However, an employer may permissibly consider the specific conduct underlying the arrest, and how that conduct may affect a person's fitness for a particular position.

Substantively, to satisfy its job-related/business necessity burden, an employer must show that any criminal-conduct exclusion "operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." The EEOC identifies two ways employers can consistently satisfy that test: first, by validating its criminal-conduct screen per the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.5, which sets forth standards for considering empirical data regarding links between particular criminal conduct and subsequent work performance; and second, by developing a targeted screen based on the three factors set forth in the Eighth Circuit's decision in *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975), followed by an individualized assessment for persons excluded by the screen. The so-called *Green* factors are (i) the nature of the crime, (ii) the time elapsed since the crime, and (iii) the nature of the job in question. The subsequent individualized assessment requires (i) notice to the excluded person that he or she was excluded because of a criminal conviction, (ii) an opportunity for the person to show why the exclusion should not be applied in this case, and (iii) consideration by the employer as to whether the information supplied by the excluded person warrants an exception to the policy.

With respect to which course is best, the EEOC acknowledges that validation under the Uniform Guidelines is unlikely because social science studies linking convictions with future workplace behavior are still rare. Thus, the employer's "best practice" is to utilize a targeted screen based on the *Green* factors, followed by an individualized assessment. The Guidance notes that in certain cases, the individualized assessment may not be necessary if the targeted screen is sufficiently "narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question"; however, the Guidance reflects a strong preference for the individualized assessment as a surer way for employers to avoid Title VII liability.

Finally, the Guidance addresses the extent to which federal, state, and local restrictions on the hiring of persons with criminal backgrounds can be harmonized with Title VII. The EEOC's position is that Title VII does not preempt federally-imposed restrictions, but that Title VII will come into play if an employer imposes a criminal-conduct exclusion that goes beyond the federal restrictions. In contrast, state and local restrictions are preempted by Title VII; thus, if a criminal-background exclusion results in Title VII liability under the above analysis, the fact that the exclusion complied with state or local law is not a defense.

## **Employee/Union View**

The EEOC correctly identifies the societal factors that can lead to unlawful discrimination through employers' use of criminal-background information in making employment decisions: an increasing number of job applicants and employees who are denied opportunities because of past contact with the criminal justice system; the resulting disproportionate exclusion of Title VII-protected persons as a result of much-higher arrest and incarceration rates of African-Americans and Hispanics; significant errors and inaccuracies in the databases that yield criminal-background information; and widely-held stereotypes concerning the criminality of certain ethnic groups.

The Guidance seeks to remedy the potential for discrimination by placing the burden squarely on the employer to show that the specific past criminal conduct in question poses an unacceptable risk for the particular position at issue. Failure to make that showing may result in Title VII liability. Accordingly, under the Guidance, protected persons who are denied an employment opportunity because of a criminal background may have viable Title VII claims where:

- Denial of an employment opportunity was based solely the fact of an arrest;
- The employer used a blanket exclusion in the hiring or promotion process that simply screened out all persons who have ever been convicted of a crime;
- The exclusion did not take into account the nature of the crime, the amount of time elapsed since it occurred, and the nature of the job at issue (i.e., the *Green* factors);
- The employer did not provide an opportunity for the excluded person to explain a criminal background (especially if that opportunity was offered to a non-minority);
- The employer has a reputation for excluding persons with criminal backgrounds or discouraging them from applying for positions; or
- The employer has expressed stereotypical views concerning the criminality of certain racial or ethnic groups.

Although the Guidance is not controlling authority, its comprehensive discussion of this issue and its use of hypothetical factual illustrations make it a powerful tool for plaintiffs in Title VII employment-discrimination cases. Unions, too, should look to the Guidance when evaluating criminal-background exclusion policies in collective bargaining agreements or employee handbooks.

## **Employer/Management View**

The EEOC suggests that employers eliminate policies or practices that exclude individuals from employment based solely on their having any criminal record whatsoever, as this will never be

consistent with business necessity. The Guidance provides some practical steps employers can take to implement "best practices" when considering arrest and conviction records in making employment decisions:

- Develop written policy and procedures for screening applicants and employees regarding criminal conduct;
- Train managers, hiring officials, and decision makers regarding the implementation of the abovementioned policies and procedures;
- Limit inquiries regarding criminal records to those that are "job related for the position in question and consistent with business necessity"; and
- Keep information regarding applicant and employee criminal records confidential.

The Guidance does not prohibit the use of criminal records in hiring or employment decision making. However, it does state that employers should be able to show how the use of criminal records to make employment decisions is "job related and consistent with business necessity" by:

- Reviewing their criminal background check processes with a focus on evaluating whether they are consistent with the EEOC's new guidance;
- Developing a written hiring policy and a targeted screening process that considers job-related factors;
- Using an individualized assessment when criminal background information is discovered to ensure the screening process is job-related and consistent with business necessity for the specific situation;
- Reviewing job applications to ensure inquiries regarding criminal activity are "job-related and consistent with business necessity"; and
- Training managers, recruiters, and others on the applicable federal and state law and EEOC guidance.

While the Guidance is not binding law, and takes some positions that are more expansive than what is required under current law, it is the standard that the EEOC will use when evaluating discrimination complaints based on the use of criminal history information in employment decisions and the courts may look to it in their analysis of these issues. Thus, employers need to act prudently when deciding what course to follow.

This Hot Topic was prepared by the [Employment Rights and Responsibilities Committee](#) of the ABA Section of Labor & Employment Law with the assistance of [Kevin Case](#), who represents employees and unions at [Moen & Case LLP](#) in Chicago, IL and [Kevin Carr](#), who represents employers and management at [Spilman Thomas & Battle PLLC](#) in Charleston, WV.

For a more in-depth look at the nuances and implications of this new EEOC Guidance, join Carol Miaskoff, Acting Associate Legal Counsel of the EEOC, and other experts in a Webinar titled: *Arrest and Conviction Records in Employment Decisions: The EEOC Explains Its Updated Guidance*, which will be broadcast live on Wednesday, June 13, 2012 from 1:00 p.m. to 2:30 p.m. EST. To find out more information about this Webinar or to register, click on the following link: [http://apps.americanbar.org/cle/programs/t12acr1.html?sc\\_cid=CET2ACR-A](http://apps.americanbar.org/cle/programs/t12acr1.html?sc_cid=CET2ACR-A)

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