

## **EEOC ENFORCEMENT GUIDANCE CONCERNING CRIMINAL RECORDS**

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) issued a new enforcement guidance titled "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" ("Guidance"). While this Guidance reiterates long-held positions by the EEOC concerning the use of criminal records in employment decisions, the issuance of this Guidance also potentially signals an area of increased scrutiny by the EEOC. The EEOC may have been motivated to reissue and expand on its position concerning criminal records due to the proliferation of background checking by employers over the past two decades. Due to technology and decreased costs, more employers are utilizing criminal background checks than ever before. Also, it appears the EEOC has been heavily lobbied by groups who seek to promote employment opportunities for former convicts and prisoners and oppose employers' exclusions based upon criminal records, viewing it as a major impediment to the employment of former prisoners and convicts.

The EEOC's basic premise concerning criminal records is that two protected groups, African Americans and Hispanics, have a higher rate of criminal convictions than the general population<sup>1</sup>. As a result, adverse action based on convictions in employment decisions would have a "disparate impact" on African Americans and Hispanics. Accordingly, the EEOC requires that any adverse decisions based upon criminal records to be job-related and consistent with business necessity, which is consistent with longstanding disparate impact tests. A blanket exclusion of applicants with criminal convictions would constitute per se illegal discriminatory activity which has a disparate impact upon African American and Hispanic job applicants.

The basic rules articulated by the EEOC are fairly straightforward. First, any record of arrest should not be considered by an employer in making any employment decisions (with one exception), because: (1) statistics indicate that African Americans and Hispanics are arrested at a higher proportion than the general public and (2) an arrest does not mean that the person has engaged in any criminal activity. One narrow exception to this rule is when the employer has investigated the conduct leading to the arrest and bases its decision on the conduct of the individual and not the arrest.

With regard to convictions, the EEOC takes the position that the employer must start with an analysis that looks at three separate items:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and/or completion of the sentence;
- The nature of the job held or sought.

The EEOC also requires an employer to do an individual assessment of each applicant or employee with a criminal conviction in which the applicant/employee would be given an opportunity to explain or even refute the conviction. After going through this process the employer could make a decision based upon the criminal conviction as long as it is job-related and there is a business necessity to support that determination.

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<sup>1</sup> Though not discussed in the Guidance, this theory might also support a reverse sex discrimination claim since male criminal conviction rates are much higher than females' rates.

Obviously, determining “job-related” and “business necessity” is not a bright line determination and is subject to differing conclusions. However, the amount of economic and/or human risk involved in a job position is a key factor determining, whether a conviction can disqualify an applicant or employee from a job. Stated another way, the greater the risk of economic or human harm connected with a job, it is more likely the employer can disqualify employees convicted of crimes associated with the specific risk.

While the EEOC Guidance largely restates prior EEOC policy, two startling departures appear in the Guidance. First, the EEOC “recommends” that no inquiry concerning arrest or convictions be on employment applications or, at a minimum, be limited to inquiries about convictions that the employer has determined are job related and consistent with business necessity.

Second, the EEOC takes the position that complying with a state or local law which restricts or prohibits employment of individuals with records of certain criminal conduct may be preempted by the Federal Title VII laws and will not necessarily provide an absolute defense to an employer.



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