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Discriminatory Use of Criminal Background Checks

Who, What, Why . . .

Who does it apply to: All employers that use criminal background checks to evaluate applicants or employees.

What is the issue: Blacks and Hispanics are statistically more likely to be arrested and convicted of crimes than whites. As a consequence, employers who make a blanket rule that any person with an arrest or conviction should not be hired or promoted may be unintentionally discriminating. The EEOC recently used these statistics to force a settlement with Pepsi® over its policy against hiring anyone who has been arrested. Following the settlement, the EEOC issued new guidelines regarding the use of criminal background checks.

Are the EEOC's guidelines law: The guidelines do not change existing law, but they reflect the EEOC's focus on this issue and its intent to use the statistics against businesses.

How is the discrimination happening: You all know discrimination is illegal. You are probably less clear on the legal framework underlying discrimination, which comes in two forms: "disparate treatment" and "disparate impact". Disparate treatment involves intentionally treating one employee or a group of employees differently because of a protected characteristic. Disparate impact is a little more subtle. It involves a rule or policy established by an employer that disproportionately affects people in a protected group – here Hispanics and Blacks.

The EEOC's new guidelines are primarily directed toward disparate impact discrimination where employers use criminal background checks as a threshold test to weed out applicants without considering the facts of each individual case. Even though the employer's policy is not discriminatory on its face, it can have the unintended consequence of reducing the number of Blacks and Hispanics in the employer's workforce.

What are employers supposed to do differently: To avoid accidentally denying a disproportionate number of Blacks or Hispanics a job or promotion, employers who use criminal background checks are required to make an in-depth analysis of that background. Employers cannot simply deny all people

employment because they have been arrested or convicted of a crime. Instead, an employer must determine whether the specific criminal history should be used as a consideration for the job or promotion at issue.

Stated simply, employers should consider whether the particular crime should really act as a reason to deny a person employment to the particular job or promotion at issue. As an example, a person considered for a night watchman position where people are rarely encountered should not necessarily be denied a job because of a conviction for assault in high school.

The EEOC wants to foster the use of targeted exclusions for particular positions. This means that employers should evaluate each job category and exclude applicants with a criminal history only if that history relates to the performance of the job in question.

Are arrests somehow distinguishable from convictions: In the EEOC's view, employers should not ever use an arrest alone as a basis to deny a job or promotion to a candidate. The EEOC cites two primary reasons for this view: (1) arrested people are still innocent until proven guilty; and (2) criminal databases are sometimes incomplete, leaving final dispositions out of records which might reflect an acquittal or failure to prosecute. Interestingly, the EEOC does believe that employers can evaluate the underlying facts and act as judge and jury to decide whether the person committed the crime and whether there are extenuating circumstances that negate the arrest.

What type of in-depth analysis is required: The EEOC cites to court of appeals cases setting out a three pronged analysis:

- What was the nature and gravity of the offense;
- How much time has passed since the offense; and
- The nature of the position sought.

Are there some businesses that have to exclude convicts: There are a large number of federal and state laws that restrict businesses from hiring people with certain criminal records. For

example, there are federal laws restricting people with criminal histories from having federal law enforcement positions, and being child care workers for federal agencies, bank employees, and port workers. For a complete understanding of the restrictions that may affect your business, consult a lawyer.

Common Situations:

But we're diverse: Bakery of the South has a policy against hiring anyone with a criminal conviction in the last 10 years. An applicant complains under the new EEOC guidelines. After learning of the EEOC's new guidelines and that its rule might not be legal, Bakery's lawyer argues that there is no disparate impact against Blacks or Hispanics at Bakery because 40% of its employees are Hispanic and 35% are Black. Are Bakery's excellent diversity statistics sufficient to overcome the claim. Unfortunately, no. While it might seem counter-intuitive, simply having a diverse workforce does not change the fact that Bakery's hiring practices have a disparate impact. Without the policy Bakery might be 50% Black and 50% Hispanic.

But the law says I can: If the federal limitations for working in banks are convictions within the last 10 years, Bankorama figures limiting for 20 years would be even better. It can pride itself on the security it takes for its customers. Is this OK? There is no clear answer, but you can bet the EEOC is going to take the position that 10 years is good enough for the federal regulations, so it ought to be good enough for you. If there are limitations in your industry, you probably should not go beyond them.

Only for applicants: Nick has been a faithful employee of Fidget Widget, Inc. for 15 years, when the company's owners sell out to Conglomerate. Conglomerate wants to promote Nick to head Fidget Widget in the absence of the old owners, but finds a

criminal conviction for felony assault 25 years ago when running a background check before the promotion. Conglomerate refuses Nick the promotion because of this single criminal event. Is Conglomerate within its rights? No. The guidance by the EEOC doesn't just apply to applicants – it applies to all employment decisions. As long as there is not a business justification consistent with Nick's position, Conglomerate will be in the wrong with the EEOC.

What should I do:

Good: Be certain you are following all federal and state requirements applicable to your business restricting the hiring of convicted individuals. Avoid using criminal convictions or arrests to make hiring decisions without a good connection to the position and your business.

Better: If using arrest as a basis to make hiring decisions, obtain the underlying facts and make your own decision about whether the applicant committed the offense. Create conviction history restrictions for each job position in your business with strong consideration of whether the restrictions set are consistent with business necessity for that job.

Best: All of the above, plus, document all facts considered for arrests and individualized circumstances considered when using convictions. Be sure to draw the connection between the job and the need of the business in doing so. Be careful not to create restrictions that are tenuous which might be questioned by the EEOC.



Michael Kelsheimer is a Shareholder in the employment law section at Looper Reed & McGraw where he is joined by a number of employment law attorneys with experience in all areas of employment and labor law. Michael recognizes that the cost and expense of litigation makes resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@lrmlaw.com or by phone at 214.237.6346