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Labor & Employment Law

IN THE NEWS

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Labor & Employment Law Update

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

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued a new Enforcement Guidance (Guidance) regarding the consideration of arrest and conviction records in employment decisions (http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm). The EEOC's longstanding position has been that an employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). The EEOC's primary concern with this practice has been employment discrimination based on race and national origin.

The Guidance does not mark a departure from the EEOC's prior position regarding the use of arrest and conviction records in employment decisions. Rather, according to EEOC Chair Jacqueline Berrien, "The new guidance clarifies and updates the EEOC's longstanding policy concerning the use of arrest and conviction records in employment, which will assist job seekers, employees, employers, and many other agency stakeholders."

The Guidance explains that employer use of arrest and conviction records could violate Title VII in several

ways. For example, a violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment). Additionally, an employer's neutral policy not to hire any individual who has engaged in particular criminal activity may disproportionately impact some individuals protected under Title VII (disparate impact).

Many employers conduct some form of background screening and must consider the Guidance in deciding how or if to use the arrest and conviction information they obtain. As a general rule, employers must show that a refusal to employ an individual based on arrest or conviction records is job related and consistent with business necessity. The EEOC notes two circumstances in its Guidance in which employers will generally meet the "job related and consistent with business necessity" defense: (1) the employer validates the criminal conduct exclusion for the position in question with the EEOC's Uniform Guidelines on Employee Selection Procedures (29 C.F.R. § 1607); or (2) the employer considers at least the nature of the crime, the time elapsed, and the nature of the job and provides an opportunity for an individualized assessment.

Employers must also understand the differences between arrest and conviction records. It is the EEOC's position that the fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based solely on an arrest is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if it makes the individual unfit for the position. Conviction records, on the other hand, usually serve as sufficient evidence that an individual engaged in specific conduct. But, in some circumstances, there may be reasons for employers not to rely on the conviction records alone in making employment decisions.

Although it is not expected that the Guidance will result in an immediate uptick in enforcement activity, employers must be very careful when making employment decisions based on criminal histories.

Proposed Rule Amending the Family Medical Leave Act Regulations Would Provide Expanded Military Family Leave and Special Eligibility to Airline Flight Crew

On February 15, 2012, the Department of Labor's Wage and Hour Division ("WHD") proposed a rule that would revise and amend certain Family Medical Leave Act ("FMLA") regulations in an effort to implement statutory amendments from 2010 that expanded military family leave provisions and incorporated a special eligibility provision for airline flight crew employees.

The FMLA entitles eligible employees of covered employers to take 12 weeks of unpaid, job-protected leave for specified family and medical reasons in a 12-month period. In 2008, the FMLA was amended to add expanded military family leave entitlements, which permitted eligible employees who are the spouse, son, daughter, parent or next of kin of a service member with a serious injury or illness suffered during deployment to take up to 26 weeks of FMLA leave during a 12-month period.

Under the proposed rule, employees caring for recent veterans (having served within the preceding 5 years)

with a serious injury or illness may take the 26-week military caregiver leave. The veteran's "serious injury or illness" could have arisen during or after the veteran left military service. The proposed rule also expands the 26 week military caregiver leave to include serious injuries or illnesses that result from the aggravation of a preexisting condition in the line of duty for both active duty service members and veterans.

Employees whose spouse, son, daughter or parent is an active duty service member will also be permitted take FMLA leave under the proposed rule to deal with financial, legal or child care issues related to the service member's deployment. This includes the right of employees to attend military events and spend time with the service member during that service member's leave.

Finally, the proposed rule includes new foreign deployment requirements that would allow families of service members deployed with the Armed Forces in foreign countries to take FMLA leave for deployment-related activities.

In addition to the expanded coverage for military families, the proposed rule eases the eligibility requirements for airline flight crew. Under the current framework, employees must have worked for their employer for at least 1,250 hours during the 12 months preceding the leave in order to qualify for FMLA leave. This was a difficult standard for airline flight crew to meet. Accordingly, the proposed rule provides that an airline flight crew employee will meet the hours of service eligibility requirement if (1) he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee, and (2) has worked or been paid for not less than 504 hours during the previous 12 months.

Comments on the proposed rule were received by the WHD until April 30, 2012. While it has not yet been adopted as a final rule, employers should be aware of these potential changes.

Clarification to February 22, 2012 Labor & Employment Law Update Regarding Supervisor Liability in Title VII Hostile Work Environment Claims

On February 22, we, like other employment law reports, reported that the Supreme Court of the United States granted *certiorari* in *Vance v. Ball State University* to review supervisor liability in Title VII hostile work environment claims. In fact, the Supreme Court has not yet granted *certiorari*, but invited the Solicitor General to file a brief expressing the views of the United States as to whether supervisor liability under Title VII applies to harassment by those whom the employer vests with authority to direct and oversee an employee's daily work, or is limited only to those employees who have the power to hire, fire, demote, promote, transfer, or discipline an employee. An invitation to the Solicitor General to file a brief is typically a strong indication that the Supreme Court will grant *certiorari*. We will continue to monitor this situation and keep you advised of the Supreme Court's actions.

For More Information

If you have questions about any of the topics in this e-Alert, please contact your Polsinelli Shughart attorney or a member of our Labor & Employment Law group.

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About Polsinelli Shughart's

Labor & Employment Law Group

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As exclusively management counsel, our attorneys have extensive experience providing employers with cost-efficient advice and aggressive defenses on employment and labor law matters. We have represented *Fortune* 500 corporations and locally owned entrepreneurial firms. We have a broad range of experience, ranging from Affirmative Action to Wage and Hour issues, through Labor Relations, Workplace Safety and Union Avoidance.

With employment litigation and advocacy expertise as our strength, preventing legal problems from arising is our goal. We can provide you counsel on an isolated incident or be involved on a regular basis. We assist our clients across a spectrum of employment questions. We provide seminars and workshops for supervisors and managers on effective employment practices.

We assist a broad spectrum of employers, ranging from small family owned businesses to multi-national corporations, in establishing policies, writing handbooks, resolving employee disputes, handling terminations and successfully defending against legal claims. By providing practical advice, based upon review and analysis of a client's employment policies and practices, the law and the human experience our attorneys can often anticipate potential problems and assist clients in minimizing future claims and litigation.

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About

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