

Employment Law Commentary

EEOC Updates Guidance on Using Criminal Records in Hiring Decisions

By **Antonio L. Ingram II**

On April 25, 2012, the United States Equal Employment Opportunity Commission (EEOC) announced updated guidelines regarding the ability of employers to consider criminal background checks when making hiring decisions. Enforcement Guidance No. 915.002¹ advises employers on how to use criminal background checks without violating existing laws when looking at job applicants. Some groups view the EEOC's updated guidelines as merely codifying existing federal statutory and case law regarding employment discrimination. Others view the updated guidelines as controversial and are concerned about the impact these guidelines will have on their workplace environments. In this article, we examine Enforcement Guidance No. 915.002 and its implications for employers.

San Francisco

Lloyd W. Aubry, Jr. (Editor)	(415) 268-6558 laubry@mofo.com
James E. Boddy, Jr.	(415) 268-7081 jboddy@mofo.com
Karen Kubin	(415) 268-6168 kkubin@mofo.com
Linda E. Shostak	(415) 268-7202 lshostak@mofo.com
Eric A. Tate	(415) 268-6915 etate@mofo.com

Palo Alto

Christine E. Lyon	(650) 813-5770 clyon@mofo.com
Joshua Gordon	(650) 813-5671 jgordon@mofo.com
Raymond L. Wheeler	(650) 813-5656 rwheeler@mofo.com
Tom E. Wilson	(650) 813-5604 twilson@mofo.com

Los Angeles

Timothy F. Ryan	(213) 892-5388 tryan@mofo.com
Janie F. Schulman	(213) 892-5393 jschulman@mofo.com

New York

Miriam H. Wugmeister	(212) 506-7213 mwugmeister@mofo.com
----------------------	--

Washington, D.C./Northern Virginia

Daniel P. Westman	(703) 760-7795 dwestman@mofo.com
-------------------	-------------------------------------

San Diego

Craig A. Schloss	(858) 720-5134 cschloss@mofo.com
------------------	-------------------------------------

London

Ann Bevitt	+44 (0)20 7920 4041 abevitt@mofo.com
------------	---

Beijing

Paul D. McKenzie	+86 10 5909 3366 pmckenzie@mofo.com
------------------	--

Hong Kong

Stephen Birkett	+852 2585 0818 sbirkett@mofo.com
-----------------	-------------------------------------

Tokyo

Toshihiro So	+81 3 3214 6522 tso@mofo.com
--------------	---------------------------------

(Continued on page 2)

Background

Statistical and Social Context of Enforcement Guidance No. 915.002

The EEOC issued the updated Enforcement Guidance No. 915.002 in order to specifically address the way that racial minorities are potentially discriminated against in terms of hiring policies. The new Guidance replaces two previous EEOC policies, a 1987 EEOC Policy Statement regarding Conviction Records and a 1990 Policy Guidance on the Consideration of Arrest Records. The updated guidelines cite statistics that show that Latino and African-American men have higher rates of arrest and incarceration compared to their white peers. If current incarceration rates do not change, one in six Latino men will serve time in prison during their lifetime, compared to one in 17 white men and one in three African-American men. In 2010, African-Americans made up 14% of the general population, but constituted 28% of all arrests. People of color were more likely than Caucasians to be arrested, convicted, or sentenced for drug offenses despite the fact that both populations have similar levels of drug use according to the guidance.

Legal Issues

The relationship between these statistics and the updated guidelines becomes clearer when examined in the context of the multiple theories of employment discrimination established by the Supreme Court. According to the court's holding in *Griggs v. Duke Power Co.*², there are two important theories of employment discrimination: (1) disparate treatment and (2) disparate impact.

- *Disparate treatment* means the intentional discrimination against protected groups, for example, if an employer required only African-Americans to undergo a criminal background check, but did not ask white job applicants to undergo such a check.
- *Disparate impact* occurs when

employers use selection procedures that are neutral and fair on their face but are discriminatory in effect. Disparate impact can be shown when a policy has the effect of disproportionately excluding minority groups. Arrest records based on the statistics cited above are a good example.

Disparate impact theory is the basis upon which the EEOC has issued its updated guidelines.

Compared to their white peers, people of color have a disproportionate level of criminal offenses. The presence of these offenses on criminal background checks impairs their eligibility for many jobs. For example, the EEOC cited surveys that indicate that as many as 92% of responding employers state that they subjected all or some of their job candidates to background checks. Thus, as a result of their higher levels of arrest and incarceration, African-Americans and Latinos could be excluded in higher numbers from jobs depending on how those records are used. The EEOC announced their updated guidelines in order to clearly state the standards for the role that criminal records can play in hiring decisions.

Employment Law Supporting Updated Enforcement Guidance No. 915.002

Employers violate Title VII when plaintiffs prove that the employer treated them differently based on their race, national origin, or any other protected basis. In *Green v. Missouri Pacific Railroad*³, a case decided in the 1970s, the Eighth Circuit Court of Appeals held that employers must follow certain standards when disqualifying job applicants based on a criminal record. The court held that employers needed to assess

- the nature and gravity of the offense or conduct,
- the time that has passed since the offense and/or completion of the sentence, and

The New ELC Resources Page

In an effort to make the monthly Employment Law Commentary (ELC) more accessible to our readers on a long-term basis, we have created a special ELC Resources page on our website. Prior issues of the ELC are available for your review in one convenient location. We also created a topical index to help you locate the ELCs that are most pertinent to your needs. To check it out, please click [here](#).

- the nature of the job held or sought.

The standards set forth in *Green* are almost identical to the standards set forth in the updated Enforcement Guidance No. 915.002. Many commenters have stated that the EEOC is merely codifying preexisting law that has its origins in both *Green* and Title VII. Other employers view the EEOC's decision as more controversial because it clearly spells out the limits of the ability of employers to exclude job applicants based on their criminal records. Many employers state that they are concerned that these updated guidelines will lead to more dangerous workplaces. Based on a comparison of the updated guidelines and previous statutory and case law, there seems to be little reason for alarm. The EEOC merely rearticulates policies that have been on the books for a number of years. On the other hand, the updated guidelines are not merely an academic exercise as the EEOC is in the midst of investigating hundreds of criminal background check charges.

Federal Standards for Hiring According to Enforcement Guidance No. 915.002

Arrests

According to the EEOC guidance, based on case law, employers must conform to certain standards when making hiring

(Continued on page 3)

decisions that consider criminal records. For example, in general employers cannot consider the arrest record of a job applicant. However, the one exception is that employers can look at the underlying conduct that caused the arrest. For example, if an applicant is arrested for beating a child, a day care center can consider the underlying context of the arrest in making hiring decisions. Nonetheless, arrests cannot be taken into consideration more generally because the EEOC points out that being arrested does not make one guilty of criminal behavior. For example, due to racial profiling, many law-abiding citizens may well be arrested without cause and thus arrest records often say more about the racial demographic of job applicants than whether they are qualified for the job.

Convictions

In regard to convictions, the EEOC guidelines are more nuanced. In general, employers can use convictions to exclude applicants. However, the EEOC's updated guidance provides that criminal records that warrant exclusion should be limited to convictions:

- related to the position in question, or
- consistent with business necessity

Exclusion Related to the Position in Question

To establish that a conviction is job-related, the employer needs to prove that the conviction is an example of specific criminal behavior that is connected with risks inherent in the duties of the position. For

example, not hiring an African-American for an administrative assistant position, a position which involves taking down credit card numbers, because she has been convicted of multiple instances of fraud involving personal information, would be consistent with the EEOC's guidelines. The fact that the job applicant has a conviction in an area related directly to the position in question justifies the exclusion.

Consistent with Business Necessity

The EEOC updated guidance also describes a standard called "consistent with business necessity" that is slightly more nebulous. In the past, if employers could not link the conviction to the risk inherent in the position, they would often attempt to justify exclusion based on business necessity since it was vaguer. Nonetheless, the updated guidelines mention two factors that employers must satisfy to comply with the standards for criminal exclusion based on business necessity.

Employers can look to the Uniform Guidelines on Employee Selection Procedures⁴ to validate a criminal conduct screen. These standards should be used in cases where data exist about particular criminal behavior and how it relates to how individuals perform in the workforce. Employers can use this information to prove that not hiring an applicant is consistent with business necessity. Or, employers can create a targeted screen involving a series of screening procedures that include the nature of the crime, the time elapsed, and the nature of the job. If the screens are narrowly tailored to

include relevant crimes and exclude irrelevant crimes, then employers may be able to pass the consistent-with-business-necessity test. Additionally, employers should let applicants know if their application is denied because of a criminal record revealed by a background check. Employers should then allow applicants to explain their criminal history before the employer makes a final decision.

Rights of Employers after Enforcement Guidance No. 915.002

Employers cannot completely bar consideration of individuals with prior convictions.

Nonetheless, employers are still able to exercise substantial amounts of discretion in regard to hiring individuals with criminal convictions. The EEOC has not prohibited employers from asking potential employees about their criminal history or even performing background checks on potential employees. The EEOC merely requires employers to be more nuanced and specific in terms of their hiring process and how they screen applicants.

Antonio L. Ingram II is a summer associate in San Francisco. He can be reached at 415-268-7710 or aingram@mofo.com.

1. Available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
2. *Griggs v. Duke Power Co.*, 401 U.S. 424 (U.S. 1971).
3. *Green v. Missouri P. R. Co.*, 523 F.2d 1290 (8th Cir. Mo. 1975).
4. Available at <http://www.uniformguidelines.com/uniformguidelines.html>

About Morrison & Foerster

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for nine straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger.

This newsletter addresses recent employment law developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

If you wish to change an address, add a subscriber, or comment on this newsletter, please write to:

Wende Arrollado
Morrison & Foerster LLP
12531 High Bluff Drive, Suite 100
San Diego, California 92130
warrollado@mofo.com