

## **Labor and Employment Law Update** **Lawyers for Employers®**

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### **EEOC Broadens Enforcement of Title VII of the Civil Rights Act**

The Equal Employment Opportunity Commission (“EEOC”), the agency charged with enforcing federal anti-discrimination laws, has recently taken two steps to broaden the scope of enforcement of Title VII of the Civil Rights Act of 1964. First, the EEOC has issued updated guidance regarding how employers may use arrest and conviction records to make legally permissible employment decisions under Title VII. Second, the EEOC has determined that transgender individuals are covered by Title VII’s prohibition against “sex” discrimination.

### **Updated EEOC Enforcement Guidance Regarding Criminal Background Checks**

In furtherance of its efforts to eradicate the more covert forms of discrimination often associated with criminal background check policies, the EEOC has issued a revised [Enforcement Guidance on the Consideration of Arrests and Conviction Records in Employment Decisions](#) (“Guidance”) that signals more aggressive oversight in this area. The EEOC’s Guidance explains how an employer’s use of arrest and conviction records can violate Title VII, under theories of either disparate treatment or disparate impact. According to national criminal history data, criminal background checks may have a disproportionate impact on racial minorities. Thus, while a criminal background check policy may appear racially neutral on its face, it may create a “disparate impact” on a protected group and therefore violate Title VII. The updated Guidance provides hypothetical examples of how employer practices may create disparate treatment and disparate impact liability under Title VII, and concludes with a list of recommended “best practices” for avoiding such exposure.

### **What Does the EEOC’s Guidance Mean for Employers Evaluating Criminal Records?**

In its updated Guidance, the EEOC continues to advise employers who are evaluating an applicant’s criminal record to consider: (1) the nature or gravity of the offense or conduct; (2) the time elapsed since the conviction and/or completion of the sentence; and (3) the nature of the job sought or held. While the 52-page Guidance should help employers understand how the EEOC expects these factors to be applied, the following are four key “take-aways”:

1. ***Individualized Assessments May Help Employers Avoid Liability:*** The Guidance recommends an “individualized assessment” approach to criminal background checks. Employees or applicants who are screened out due to a criminal record should be given an opportunity to respond or explain their record, and employers should consider extenuating circumstances before making a final decision. While the Guidance does not *require* an individual assessment in all instances, such an assessment is a “best practice.”
2. ***The Guidance Advises Against Inquiring About Convictions on Applications:*** The EEOC Guidance recommends that employers refrain from asking about convictions on job applications. If an employer chooses to ask about convictions on the job application, the employer must be prepared to show that the conviction is relevant to job duties.
3. ***Arrest Records Alone May Not Be Used to Deny Employment:*** The EEOC Guidance reaffirms that arrest records must be treated differently than conviction records. An arrest record alone may not be used to deny employment because an arrest does not prove the conduct occurred. However, in those jurisdictions where state law does not ban inquiries regarding arrest records, the Guidance recognizes that an employer may consider whether the conduct leading to the arrest is relevant to the position. As an example, the Guidance cites a school principal who was arrested for alleged sexual abuse and endangering the welfare of children. According to the EEOC Guidance, it would likely not be discriminatory to fire the principal for his underlying conduct because the termination would not be based on the fact of the arrest.
4. ***Compliance With Federal Law Will Not Violate Title VII:*** Where an employer is conducting background checks in compliance with a federal law or regulation, the employer will be shielded from liability under Title VII. Employers must be careful not to exceed the scope of the federal regulation because such action may result in loss of the defense. Compliance with state law, however, may not shield employers from Title VII liability. This is because Title VII pre-empts state and local laws that conflict with it. However, compliance with state or local law may still be relied upon by an employer as part of a “business necessity” defense.

### **EEOC Holds That Transgender Individuals Are Protected Under Title VII**

In the first opinion of its kind, on April 20, 2012, in *Macy v. Holder*, the EEOC held that transgender individuals are protected by Title VII. Ms. Macy is a transgender woman who filed a complaint alleging that the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives discriminated against her based on her sex and her gender identity. The EEOC initially advised Ms. Macy that her gender identity allegation was not covered by Title VII. On appeal, the EEOC sided with Ms. Macy, finding that Title VII covers discrimination on the basis of gender stereotyping. According to the EEOC, the ruling does not create a new cause of action, but simply clarifies that gender stereotyping is considered sex discrimination covered by existing law. The EEOC’s decision will serve as precedent for all EEOC regional offices, and will be binding on all federal agencies covered by Title VII. Federal and state courts are not bound by the decision, but may give deference to the EEOC’s opinion.

### ***What Does Transgender Coverage Under Title VII Mean for Employers?***

Employers will violate Title VII if they discriminate against applicants or employees whose identity, behavior, or appearance do not conform to cultural and societal gender norms. This is not new in Washington, where the state anti-discrimination statute already makes it unlawful to discriminate against transgender individuals based on gender identity or expression; however, other states, including Alaska and Oregon, do not currently provide comparable coverage to transgender individuals. In states such as Washington, covered employees can now bring both state and federal discrimination claims. This has at least two important ramifications for potential plaintiffs. First, unlike Washington's Law Against Discrimination, Title VII provides for punitive damages in certain cases. Second, claimants typically have 180 days from the last discriminatory incident to file a charge with the EEOC, but where Title VII and a state or local anti-discrimination law both provide coverage, the deadline is extended to 300 days.

### ***What Should Employers Do Now?***

- Update equal employment and anti-discrimination policies and practices to ensure that they explicitly prohibit discrimination against transgender individuals. Review workplace policies that may be implicated when individuals undergo gender transitions, including dress code and privacy policies, as well as restroom guidelines.
- Modify background check policies and practices to ensure compliance with the EEOC's Guidance on criminal background checks. Evaluate whether or not to ask about criminal convictions on employment applications, depending on the nature of the job and industry. Upon learning about a criminal conviction, and before automatically disqualifying an applicant or taking adverse action against an employee, consider engaging in an individualized assessment that includes asking the applicant or employee about any extenuating circumstances.

**For more information, please contact the Labor and Employment Practice Group at Lane Powell: [employlaw@lanepowell.com](mailto:employlaw@lanepowell.com)**

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