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An important Labor & Employment law update from the law firm of Jackson Walker.

**April 26, 2012**

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## EEOC Updates Guidance on Use of Arrest and Conviction Records

By Jon Mark Hogg

Yesterday the EEOC issued its updated guidance on the use of arrest and conviction records in employment related decisions. The new guidance does not fundamentally change the EEOC's position, but it does provide more in depth analysis incorporating case law and statutory developments, sociological and criminal research and other information regarding the use of criminal records in employment decisions. While the updated guidance is rather lengthy, among the significant changes in the updated guidance are:

- Discusses application of disparate impact principles related to the use of qualifications and criminal records
- Explains how EEOC analyzes the "job related and consistent with business necessity" standard for excluding applicants or employees with criminal records and gives hypothetical examples
- States that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provides a defense to a Title VII claim
- Provides that state and local laws or regulations are preempted by Title VII if they "purport to require or permit the doing of any act which would be an unlawful employment practice" under Title VII
- Provides "best practices" for employers to consider when making employment related decisions based on criminal records

Of particular note is the discussion related to how an employer determines whether an exclusion is job related and consistent with business necessity so as to be a defense to a disparate impact enforcement action. The EEOC believes employers will consistently meet this test in two circumstances: (1) where the employer validates its screening procedure under the Uniform Guidelines on Employment Selection Procedures; or, (2) the employer uses a procedure that considers the nature of the crime, the time elapsed and the nature of the job, and then provides an individualized assessment for the person excluded. This assessment includes the opportunity for that person to demonstrate that the exclusion should not be applied in his or her particular circumstance.

Additionally, while complying with restrictions in hiring persons with arrest or criminal records under federal law is a defense, there is no such blanket protection for state laws. If a state law prohibits employment of a person with a criminal arrest or conviction, the employer is still prohibited from applying that statutory exclusion unless it can show that it is job related and consistent with business necessity. For example, relying on a state law that prohibits a county from employing anyone with a criminal conviction would not protect the employer from an enforcement action. However, complying with a statute that prohibits a person with a conviction for indecency with a child from working in a school setting would not

be a violation as it would be a job related exclusion consistent with the business necessity of protecting children in that setting.

To assist employers, the EEOC provided a **Questions and Answers** document online as well as the **Enforcement Guidance** itself.

If you have any questions regarding this e-Alert, please contact **Jon Mark Hogg** at 325.481.2560 or [jmhogg@jw.com](mailto:jmhogg@jw.com).

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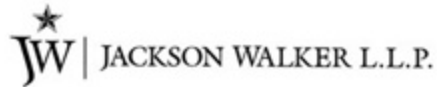
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